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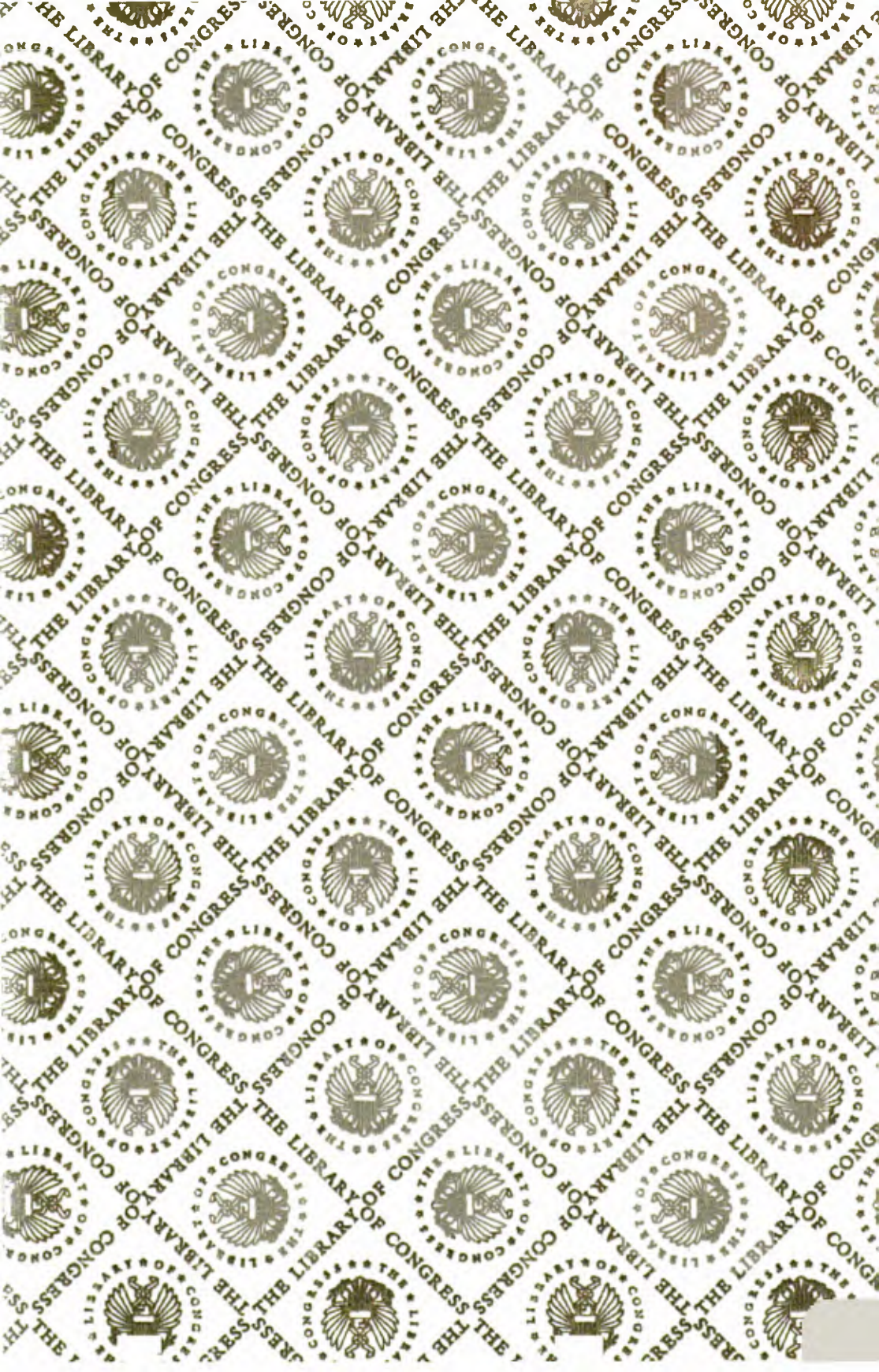
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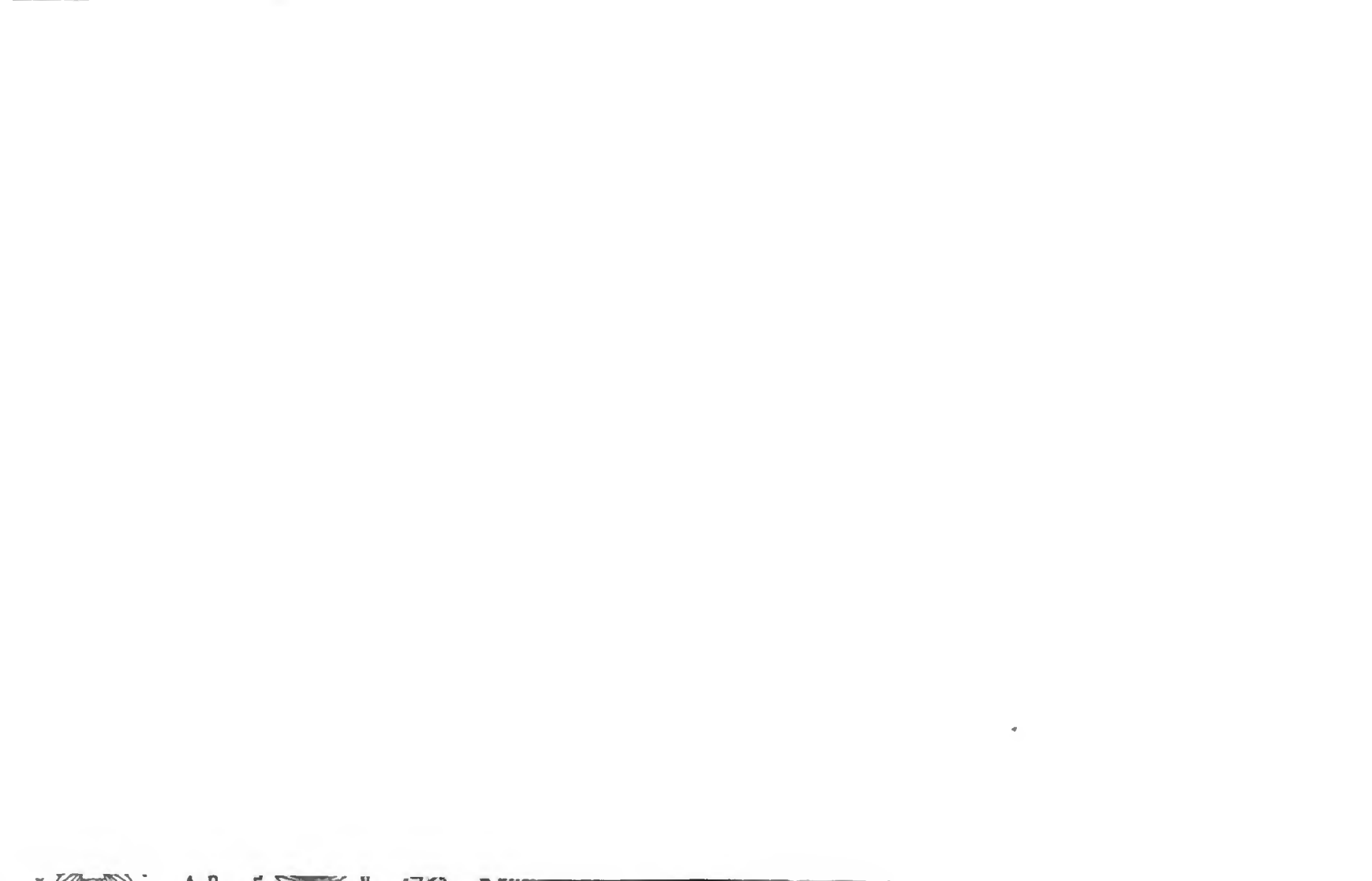

HATE CRIMES PREVENTION ACT OF 1997

United States

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

H.R. 3081

JULY 22, 1998

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HEARING DATE

HATE CRIMES PREVENTION ACT OF 1997

WEDNESDAY, JULY 22, 1998

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, George W. Gekas, Howard Coble, Charles T. Canady, Bob Goodlatte, Ed Bryant, Steve Chabot, Bob Barr, Asa Hutchinson, James E. Rogan, Lindsey O. Graham, John Conyers, Jr., Barney Frank, Charles E. Schumer, Jerrold Nadler, Robert C. Scott, Melvin L. Watt, Sheila Jackson Lee, Maxine Waters, Martin T. Meehan, William D. Delahunt, Robert Wexler, and Steven R. Rothman.

Staff Present: Sharee Freeman, Counsel; John Mautz, Counsel; Dan Bryant, Counsel; Melonie Sloan, Minority Counsel; and David Yassky, Minority Counsel.

OPENING STATEMENT OF CHAIRMAN HYDE

Chairman HYDE. The committee will come to order for a hearing on H.R. 3081, the Hate Crime Prevention Act of 1997, and the Chair is pleased to recognize the Ranking Minority Member of the Committee on the Judiciary, the Honorable John Conyers of Michigan.

Mr. CONYERS. Thank you, Chairman Hyde. Good morning, Members. We are here today to examine the Hate Crimes Prevention Act of 1997, H.R. 3081. In effect, the genesis of this bill tracks back to the '40's when the NAACP and others were trying to pass a Federal anti-lynch statute. And for years and years that legislation was introduced and did not go very far. The impetus for this measure that brings us here today is the terrible tragedy that occurred recently in Jasper, Texas, in which the Nation, Texans in particular, and Members of Congress in both Houses and both parties made public their outrage that a lynching can still go on. So it is my intention, if this measure succeeds, and I feel that it will, that this bill be also named in honor of the late James Byrd, who was brutally murdered and is the causative force behind this measure.

May I also thank you, Chairman Hyde, for the speed in which you have moved in assembling us to examine the proposed legislation. Its timing is important. As a matter of fact, in this business and in basketball, it is everything. So the fact that we are moving with some dispatch—yes, as jazz aficionados, the chairman reminds me, in music, too. We are moving here today to examine how we

prevent the crime that occurred in Jasper, Texas, and how we make sure there is a Federal jurisdiction. It may come as a surprise that unless a Federal, unless a crime of this kind occurs on Federal property, is somehow connected or comes under the jurisdiction of the Civil Rights Act or the Voter Rights Act, there is literally no Federal jurisdiction. We propose to change this with the modest measure that is before us, and what we want to do is make this a Federal crime, amend some of the federally protected activities, and to make sure that we do not end up hoping that a State prosecutor somewhere will be the one that decides to go forward or in some instances not to go forward.

The history of violence, racial violence in this country is too well known by all of us to have to, to need to review it here. But it is a critical element in moving this country forward. I see this as an all important measure, and I am pleased that we have such a distinguished group of witnesses.

Someone raised a question about constitutionality. I think it will be treated here. So there is no need for me to go into the commerce clause and the equal protection provision of the 14th amendment. What we are doing is creating a statute that will allow the government to have jurisdiction when there is the use of force, up to and including murder, or the intention of someone to harm another because of his race, color, religion, national origin and because of any of the other six federally protected activities described in title 18 245(b)(2), enrolling or attending any public school or college, participating in any benefits service privilege program administered by a State or local government, applying for, enjoying employment by any private employer or State agency, serving in a State court as a grand juror, traveling in or using any facility of interstate commerce, enjoying the services, facilities, goods of hotels, restaurants, gas stations and place of entertainment.

What we are doing is adding a couple new sections. They are important. They will be discussed and we are going to go beyond this list and increase the jurisdiction in some respects. It is time that we include in hate crimes prevention all the violence that is being reported against gays and lesbians, gender-motivated hate crimes, disabled hate crimes, attacks, looking at the growing problem of adults who recruit juveniles to commit hate crimes by directing the Sentencing Commission to examine appropriate penalty increases, and we want to authorize additional funding for prevention programs.

So this is a seminal and important hearing. I am very pleased that it has been called in such a timely fashion. I look forward to hearing from the witnesses. Thank you, Mr. Chairman.

Chairman HYDE. Thank you, Mr. Conyers. Mr. Gekas of Pennsylvania.

Mr. GEKAS. I thank the Chair. I, too, look forward to the testimony that will be offered by the various witnesses here today. As I listen and as I peruse their written statements, I will continue to ask myself the questions and, when possible, to pose those same questions to the members of the panel as to the constitutional questions that might arise in the pursuit of this legislation; secondly, the comparative rights and jurisdictions and powers of the States vis-a-vis the same subject matter that becomes the core of

this legislation and the overlapping that may or may not occur by the enforcement of the Civil Rights Act and other Federal statutes that seem to have the reaching power into situations where for generations the solution was left up to the State and its law enforcement capacities.

These questions run through many of the pieces of legislation that enter our committee, of course, and when one is of such import as the one we have today, there is even more reason to scrutinize carefully what the ultimate outcome would be of passage of this legislation.

I thank the Chair.

Chairman HYDE. Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman. I want to thank you for holding this hearing, for your fairness, as always, as you preside over this committee.

A month ago when three vicious racists tied James Byrd to the back of their car and dragged his body for 2 miles, Americans were united in our revulsion for this atrocious crime. Well, we should challenge our anger and our frustration and do something positive. We must be united in our determination to stop these awful crimes from happening again and again and again.

That is why I am proud to be the sponsor of H.R. 3081, the Hate Crimes Prevention Act, along with my friend Mr. Conyers who has been such a leader and a beacon on these types of issues for many, many years and Senator Ted Kennedy in the Senate. I am also proud to say that we have been joined by more than 100 bipartisan cosponsors here in the House. When there is a lynching like what happened to James Byrd, or when a gay man is beaten up for the crime of holding hands or when a synagogue is vandalized, the damage goes way beyond the individual victim. When a hate crime is committed, the entire Nation is wounded. The message of each of these episodes is you do not belong, just by virtue of the color of your skin or your religion or your sexual preference, or your gender, you do not have the right to walk on the street without the fear of violence. If I could ever think of anything that is un-American, it is that. E pluribus unum, out of many, one. That is a great thought. Our country has been ever since its founding trying to live up to that rule. We struggle to do that because of the natural weaknesses of people. But we always try to turn to our higher side and when we are moving this legislation, that is what we are doing. If I could think of something that desecrates what our American flag stands for, it is beating up someone because they are black or they are gay or they are a different religion. That is true desecration of the American ideal, every bit as much desecration as anything else. So that is why it is so important that these crimes be condemned in their strongest possible terms.

We in the Congress, we who speak for the overwhelming majority of tolerant Americans must speak out loudly and clearly, if not, the bigots win. I believe this legislation is a crucial part of our answer to hate crimes. Under current law the Federal Government can prosecute a hate crime only by proving that the perpetrator intended to prevent the victim from exercising a federally protected right such as voting or attending school. It is hard to prove, even when it does occur because it is intention, and because many hate

crimes do not fit this narrow definition, U.S. attorneys have been unable to pursue some of the most vicious hate crimes in recent years.

Our bill would eliminate that arcane requirement. Whenever an American is beaten or assaulted because of prejudice, in my judgment it is a matter of national concern. So I am looking forward to the witnesses' testimony but I want to make one more point here at the outset. Since I introduced this bill, I have been asking my colleagues for support. There has been one area of resistance from Members who are uncomfortable with including sexual orientation as a protected category.

First, I remind my colleagues in our earlier hate crimes bill we did proudly stand and include sexual orientation in that category. This hearing will be important to lay out for those members the reality facing too many gay and lesbian Americans. We will listen to the testimony of Marc Bangerter from Boise, Idaho. There are two points I wish we would pay attention to. One is, he was beaten and he is not——

Chairman HYDE. The gentleman's time has expired.

Mr. SCHUMER. I ask unanimous consent for an additional 1 minute.

Chairman HYDE. Everybody is going to want—you may have it. I am just suggesting everyone is going to want to make a statement. We would like to get to the witnesses.

Mr. SCHUMER. He was beaten because he hugged a friend of his. He is not gay. But the beater thought he was. Second, the local Boise authorities were unwilling really to intervene. So without Federal recourse he was lost. So this bill is not about special preferences nor some theoretical identity politics agenda. It is real. Crimes against gays and lesbians have increased 12 or 13 percent in the last year, and we should not turn to the dark side and submit to those who seek to divide us in hate when we move this very noble and American piece of legislation.

Chairman HYDE. Mr. Coble.

Mr. COBLE. Mr. Chairman, I have an opening statement, but in the interest of time, I will waive my opening statement.

Chairman HYDE. I thank the gentleman.

Mr. Scott? Following that precedent, Mr. Scott.

Mr. SCOTT. I think that is wishful thinking, Mr. Chairman. I am delighted to follow precedent, but I would just like to make a very brief statement. I appreciate the opportunity to participate in today's hearing on hate crimes. It is abhorrent that in 1998 people still are being killed, bombed and assaulted just because of their race, sexual orientation and disability. This is not just in Texas. Many other States, including Virginia, have suffered shocking hate crimes from graffiti to torture and murder. There are some things that we should be doing to make this a more safe and productive environment for all of the Nation's citizens. There are a wealth of civil rights laws and enforcement programs that are deserving more appropriate support from Congress, but unfortunately we have not done as much as we should in reducing discrimination against minorities in housing, employment contracting and education. In fact, most of our efforts in addressing discrimination have been focused on reducing the effectiveness of the Fair Hous-

ing Act, the contracting for minorities and educational opportunities for minorities, and virtually nothing to address discrimination against minorities.

Therefore, I am delighted to see the focus of today's hearing, which is on the most egregious manifestation of bigotry, and that is hate crimes where victims are selected for violent attacks as a result of the bigotry of the attacker. As has already been said, there are constitutional constraints on what we can do about this and therefore I am delighted that the chairman has convened this hearing so that we can fashion a bill that can withstand technical challenges.

Chairman HYDE. Mr. Canady?

Mr. CANADY. Very briefly, Mr. Chairman. I want to express my appreciation for the witnesses being here today. I look forward to their testimony.

Chairman HYDE. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I appreciate, Mr. Chairman, the holding of this hearing, both to you and Mr. Conyers for the wisdom in moving this issue rather quickly. I would like to have my opening statement in its entirety submitted for the record. I ask unanimous consent.

Chairman HYDE. Without objection, so ordered.

[The information referred to follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank-you Mr. Chairman. When Thomas Jefferson wrote the Declaration of Independence he stated that, "We hold these truths to be self evident that all Men Are created Equal."

Women, African Americans, Native Americans, Hispanic Americans, Asian Americans, and Jewish Americans were historically, culturally, and prospectively excluded from inclusion in that declaration.

One of the truly unique qualities of the United States and its people is our willingness to see flaws in our own political and legal system, and strive to make corrections; and as President Lincoln said in his Gettysburg Address "in order to create a more perfect union" among its individual members. The problem is our nation's judiciary system's ability to identify and address violent acts of hate crime in our society. It is particularly hard because there is no current law that makes a hate crime a federal offense. We need the Hate Crimes Prevention Act to "create a more perfect union."

According to the *Hate Crimes Statistics Act*, a hate crime is defined as acts which individuals are victimized because of their "*race, religion, sexual orientation, or ethnicity*." In this statute, hate crimes are those in which "the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.

Current law (18 U.S.C. 245) permits federal prosecution of a hate crime only if the crime was motivated by bias based on race, religion, national origin, or color, and the assailant intended to prevent the victim from exercising a "federally protected right" (e.g. voting, attending school, etc.) This dual requirement substantially limits the potential for federal prosecution of hate crimes, even when the crime is particularly heinous. The Hate Crimes Prevention Act would expand federal jurisdiction to reach serious, violent hate crimes. Under the bill, hate crimes that cause death or bodily injury because of prejudice can be investigated federally, regardless of whether the victim was exercising a federally protected right. We need the Hate Crimes Prevention Act and "*we need to become a more perfect union.*

African-Americans have historically been the most frequent targets of hate violence in the United States, and they appear to be among its principal victims today in many jurisdictions. From the lynching to the cross-burning and the church-burning, anti—black violence has been and still remains the protypical hate crime- an action intended not to injure individuals but to intimidate an entire group of people.

Hate crimes against Africa-Americans impact upon the entire society not only for the hurt they cause but for the history they recall and perpetuate.

I can begin by highlighting the most recent hate crime which captured national attention; which was the case of James Byrd in Jaspar, Texas. An African-American man was chained to a pickup truck and dragged him for almost three miles until his body was torn to pieces. The three men who were white were known to have alliances with white supremacist groups. This indeed was a perfect example of a hate crime. While these three perpetrators were apprehended and will be prosecuted under state law, there is no federal law currently on the books that would cover this abhorrent conduct. It really is going to be hard yet interesting how anyone or any advocacy group could possibly be against the Hate Crimes Prevention Act. We need to pass this legislation to help us "create a more perfect union."

In March of 1997, Lenard Clark, a 13 year old African-American young man was riding his bicycle home one day in Chicago and he was brutally beaten by three white teenagers. The perpetrators have been charged with attempted murder, aggravated battery and hate crimes under Illinois state law. However, the twist in this case is that one of the key witnesses to the beating is missing. If we actually had a federal law we would also have more of an F.B.I. involvement in this case locating the witness.

In the my hometown city of Houston in 1995, Fred Mangione, a homosexual, was stabbed to death, and his companion was assaulted. The two men, who were charged with Mangione's murder, claimed to be members of the "German Peace Corps", which has been characterized in media reports as a neo-Nazi organization based in California. This crime did not meet the State of Texas' threshold for trial as a capital offense, because the murder did not occur during the commission of a rape or robbery. Ironic, that someone can stab Mr. Mangione thirty times, steal his life away, rob the community of one of its members and rape our collective consciousness of its sense of security, and the penalty is not considered a capitol offense. In recent years, attacks upon gays and lesbians are increasing in number and in severity. During 1995, 2,212 attacks on lesbians and gay men were documented—an 8% increase of the previous year. We need the Hate Crimes Prevention Act, and we need to "become a more perfect union."

Another sexual minority that is subject to violence is "transgendered" people, an umbrella term that includes transsexuals, cross-dressers, intersexed people, and others whose sexual identity appears ambiguous. Transgendered people have been assaulted, raped, or murdered.

There have also been numerous attacks against Jews, Asians, Hispanics, and Native Americans. Fortunately, the Hate Crimes Prevention Act would protect these groups from targeted attacks because they are members of these groups.

It is finally time for the Congress to act. At present, forty-eight states and the District of Columbia have enacted some type of statute addressing hate violence. In *Wisconsin* v. *Mitchell* in 1993, the U.S. Supreme Court unanimously upheld the constitutionality of a Wisconsin hate crime penalty enhancement statute similar to current statutes in more than two dozen other states.

There are also groups perpetrating hate crimes in Cyber-space on the Internet. Ms. Angie Lowry with the Klanwatch Project said,

> "The Net makes it easier for those who share their (Klan) views to reach them than in the old days, when you had to sent $20 to a post office box and wait for a brochure."

The Internet's lightning speed and disregard for national borders has eliminated constrains of time an distance. This bill must also cover this type of conduct.

When clinched fist meet flesh and bone the pain is not in black, or white.

When a victim bleeds or feels pain it is not in the form of their religion or ethnicity.

Violence based on prejudice is a matter of national concern that federal prosecutors should be empowered to punish if the states are unable or unwilling to do so. H.R. 3081 would begin to bring uniformity to the categories covered under current federal hate crimes law. Further, many states lack comprehensive hate crimes laws, and FBI statistics show the incidence of hate crimes reported continues to be unacceptably high, although rates of most violent crimes are decreasing. *WE NEED THE HATE CRIMES PREVENTION ACT AND WE NEED TO "BECOME A MORE PERFECT UNION."*

Ms. JACKSON LEE. I think it is important to associate myself with several comments that have already been made. I would like to start this morning by acknowledging to America and for those who

wish to cover up, hide and reject the idea that hate, discrimination, anger, racism, prejudice against religions, prejudice against those who are of different sexual orientation, who speak a different language, have a different accent and have physical features that are different from someone else exist in America. I think it comes about from the origins of this Nation, both good and bad, for we realize that the Founding Fathers and Mothers left their native lands for a variety of reasons and, of course, one of the major ones was that of religious freedom. Yet there are those of us who came shackled in the bottom of the belly of a slave boat.

Now today there are those who come in a fishing boat or walk across the border. America has for some time grappled with who we are. There are those of good will who have maintained that we all are created equal. But others continue to insist that we are a divided Nation or some of us are better than others. And I bring to your attention, because I have had either the pleasure or displeasure of seeing the likes of shows like Politically Incorrect, and obviously with the first amendment they have their rights but in the debate it has been whether or not we need to enhance or have laws that protect us against hate crimes. Some of the very obvious questions, why do we not just simply say it is a crime. I wish we could be at that level, but we cannot. For those who wish to hide, I cite for you an article in the Houston Chronicle, Sunday, July 19, 1998, "Crowds Jeer Nazi March in Idaho." I frankly say to you that this happens repeatedly around the Nation. Thank God for the good people who chided those who wished to march, the Ku Klux Klan, the Aryan Nation, the Nazis. Yes, there were Americans who said go away, but these people do exist. They exist for the very fact that we have not come to an appreciation or an understanding or an overall viewpoint that diversity is good.

This legislation is important in conjunction with others. I associate my remarks with my colleague and good friend Mr. Scott from Virginia. I hope that this is the beginning of a role, if you will, to enhance our civil rights laws.

As I went to Jasper, Texas, to mourn with the Byrd family, one of the comments that I made that day was that the continued siege upon affirmative action sets the negative tone and creates the atmosphere for those who perpetrate hate. When those who are in leadership responsibilities argue and go to the highest levels of government, to the forums in the media, and cite the fact that there is no longer discrimination and no longer needs, then we have a circumstance that creates the atmosphere for others to attack Hispanics, African Americans, Asians, people of different religious faiths, Mr. James Byrd and, of course, those of different sexual orientation. This law in fact says if you do that and they are in this group, you have created and perpetrated a vicious crime.

Allow me in conclusion to simply say to the Byrd family, you have my deepest sympathy and I thank you for your heroic attitude, for sharing with America your pain. Thank you to the mother and father, to the sisters and brothers. Thank you for joining me in my hearing this coming Saturday in Houston and thank you, Rene Mullins, the daughter of James Byrd, who came to the United States Senate to beg us to pass this legislation. She now submits a statement to our hearing today acknowledging that between 2:15

and 2:30, on June 7, 1998, on his way home from an anniversary party when three Caucasian men picked him up, tortured him and dragged him to his death, all three men were convicted of prior crimes before committing the horrible murder of her father. They had been allegedly part of hate groups. Her father was dismembered.

I ask, Mr. Chairman, that this statement of Rene Mullins, the daughter of James Byrd, Jr. be submitted into the record. I ask that this record reflect what all Americans of good will would like us to do, that we begin the role of perpetrating or going against those who are perpetrators of hate, passing this hate crimes legislation and revitalizing a new civil rights movement in this Nation and making sure that we stand up against those who oppose things that provide opportunities for those of us who are different but yet claim America as our home.

[The prepared statement of Ms. Mullins follows:]

PREPARED STATEMENT OF RENEE MULLINS, ELDEST DAUGHTER OF JAMES BYRD, JR., OF JASPER, TX

I want to thank everyone here for inviting me to speak. By holding this meeting, we remember my Father and provide a foundation for future action.

I find it difficult to speak today because moments like these serve as painful reminders that my Father is gone. But I know that he would want me to address Mr. Lee and the other members of this meeting so we can prevent others from suffering his tragic fate, and I am comforted because I know that my Father can hear my voice.

As I reflect upon the senseless murder of my Father, my sorrow overwhelms me. The hatred that provoked this murder is something that I simply cannot imagine. The sheer violence of my Father's death horrifies me even now, and his attackers' utter disdain for common decency offends my sense of human dignity.

At the same time, I feel frustrated. Frustrated that current laws oftentimes cannot protect Americans like my Father. I thank the local and State law enforcement officers and prosecutors for their hard work, but I also realize that these tireless workers often lack the resources and legal support necessary to properly prosecute hate crimes.

I firmly believe that we must allow the State and local law enforcement agencies to work in conjunction with their Federal counterparts. Congressional legislation would not only allow State and Federal law enforcement agencies to combine their resources, but it would also provide Federal protection from hate crime atrocities under law.

Mr. Lee, as the Civil Rights Officer of America, you can ensure that my Father's death was not in vain. I urge you to work with your colleagues in Washington and remind them of my Father, remind them of the terrible consequences of inaction.

I also urge Congress to act. If Congress were to enact the Hate Crimes Prevention Act of 1997, my family would at least have some consolation for our anguish. Enactment of this measure, in my mind, would represent my Father's legacy.

For now, Federal law cannot reach horrifying crimes of hate such as the one committed against my Father. Under current law, someone like my Father can only receive Federal protection if he were participating in one of six Federally protected activities. Unfortunately, my Father was not attending a public school, participating in a program provided by a State or local government, applying for employment, serving as a State juror, participating in interstate commerce, or enjoying public accommodations. He simply was walking home at the time of the assault.

The Hate Crimes Prevention Act of 1997 would provide the needed protection for crimes such as this one. This well-drafted piece of legislation will provide Federal protection from hate crimes for everyone, not just those participating in Federally protected activities.

This summer has been trying for my family, and we would like to thank everyone for their prayers and words of compassion. My Father's legacy must live on, but hate crimes must die. I pray that my Father's death will serve as a constant reminder that we must work together to prevent crimes of hatred. Mr. Lee, the hatred felt by his tormenters must be matched by the determination of your heart in our

effort to wipe the grime of hate crimes that soils the countenance of our great Nation.

Chairman HYDE. Mr. Chabot?

Mr. CHABOT. Mr. Chairman, I would prefer to listen to the witnesses at this time. Thank you.

Chairman HYDE. I profoundly thank the gentleman.

Mr. Meehan.

Mr. MEEHAN. Mr. Chairman, I thank you and Mr. Conyers for scheduling this hearing. I am proud to be an original cosponsor of the Hate Crimes Prevention Act and, Mr. Chairman, with your permission, I would ask unanimous consent to submit my statement for the record in the interest of time.

Chairman HYDE. Without objection, so ordered.

[The prepared statement of Mr. Meehan follows:]

PREPARED STATEMENT OF HON. MARTIN T. MEEHAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

A 1996 Anti-Defamation League (ADL) study found that the number of anti-Semitic incidents occurring in the U.S. has declined for two years in a row—the first multi-year decline in ten years. And even though over 1,500 more law enforcement agencies participated in hate crime reporting in 1996 as compared to 1995, the number of reported hate crimes against gays and lesbians fell slightly.

Increased hate crime reporting is good news in its own right, of course, as is the fact that federal, state and local law enforcement officials are cooperating to an unprecedented extent to prosecute those who commit bias-related crimes. Indeed, President Clinton recently directed all U.S. Attorneys to establish hate crime working groups in their jurisdictions.

So can we be satisfied with our current efforts to combat hate? Absolutely not.

To start, the number of hate incidents remains too high. In 1996, state and local police agencies voluntarily reported 8,759 bias-motivated crimes to the FBI—approximately 1,109 reflecting anti-Semitism. In fact, the 1996 ADL study actually documents an increase in the number of anti-Semitic vandalism.

Furthermore, law enforcement agencies from 16 percent of our nation's population are not participating in voluntary FBI hate crime reporting. And the vast majority of agencies that did participate reported that no hate crimes were committed in their jurisdictions. For example, the 289 participating agencies from Alabama did not report a single hate crime in 1996. Frankly, I find that hard to believe.

While these statistics are telling, they fail to do justice to the special havoc wreaked by each individual hate incident. An act of violence perpetrated against a Jewish man because of his religion speaks not only to where he was at a given time or what valuable he possessed, but also who he is. The attack is thus an express and severe rebuke to his very identity.

The impact on larger communities is similarly devastating. Those who possess that characteristic that motivated a hate incident feel devalued and vulnerable. And even those who are not minorities suffer a blow. For our national identity rests largely on the celebration of diversity—in contrast to the historic identities of many of the countries our ancestors left behind. In this sense, hate incidents threaten the esteem in which we hold ourselves as a nation.

It is time for us to acknowledge that making a permanent and significant dent in hate incidents will require a much more sustained and aggressive effort than we have undertaken thus far. As a Member of Congress, I would like to dwell upon how government should be contributing to this effort—particularly in terms of documenting the extent of the problem, punishing it when criminal, and working to prevent it from happening in the first place.

There are a number of reasons why hate incidents are under-reported. In some immigrant communities, language and cultural barriers may impede reporting. Gays and lesbians have been particularly reluctant to report hate incidents, for reporting might "out" them to their families, friends and employers. Furthermore, financially strapped police departments may lack sufficient resources to provide the special training officers need to decipher some hate crimes.

At the very least, we at the federal level can do more to assist state and local police departments in overcoming obstacles to reporting hate crimes to the FBI. Rather than simply responding to requests for hate crime training by state and local law enforcement officials, the FBI should affirmatively reach out to areas where

training is known to be deficient. Congress should also find the money to provide funding incentives to states and localities that participate in FBI hate crimes reporting.

Furthermore, while the last eight years have witnessed a flurry of legislative activity relating to hate crime, our statutory framework for prosecuting and punishing such crimes remains incomplete. Notably, ten states still fail to provide enhanced penalties for any hate crimes. Less than half of our states have penalty enhancement statutes that cover crimes committed on the basis of gender, disability or sexual orientation. Indeed, the federal government's hands are largely tied where local authorities are unable or unwilling to prosecute these categories of hate crimes.

State and local officeholders must act now to remedy the gaps in their hate crime laws. Meanwhile, at the federal level, President Clinton has endorsed, and I have cosponsored, the Hate Crime Prevention Act. The Act would not only permit federal authorities to pursue hate crimes committed on the basis of gender, disability or sexual orientation but also scale back statutory hurdles currently impeding federal prosecutions of anti-Semitic, anti-immigrant or anti-African-American crimes.

Finally, elected officials must redouble their efforts to aid the development of innovative and effective ways of teaching our children not to hate. Anti-Semites are now taking to the Internet to disseminate their evil message in the form of hate-spewing web-sites or postings to unsuspecting news groups. Much of this activity is shielded from criminal sanction by the First Amendment, however. Thus, we are left to pursue the daunting challenge of encouraging today's and tomorrow's youth to reject the path embodied by Internet hatred.

In fact, there are a number of promising hate prevention initiatives in progress throughout the country. A prominent example is the ADL's four city "Stop the Hate" program, whereby teachers, parents and community leaders receive training in how to create bias-free schools and homes. Likewise, public service media campaigns in cities ranging from Omaha to Houston are sending the message that hate crimes have no place in our communities.

Still, we have a lot to learn about what works to counteract the messages of hate that children absorb from so many aspects of our culture, and the federal government has an important role to play in this regard. Congress spends millions of dollars each year to support the research and development of critical national security, energy and environmental technologies. Certainly, it should not pinch pennies when it comes to promoting the research and development hate prevention initiatives and awareness of promising approaches.

President Clinton, Attorney General Reno, and Secretary of Education Riley have the federal government moving in the right direction on this front. In 1996, the Department of Education awarded $2 million in grants to develop and implement hate prevention programs, and it is currently with the Department of Justice to distribute a hate crimes resources guide to every school district in the country. I hope that these initiatives merely mark the beginning of a larger effort at the federal level to understand and combat the root causes of prejudice.

Yes, we have made progress in the fight against hatred, but we still have far to go. The perils of complacency would be felt not only in our own communities but also abroad. Indeed, I seriously doubt that U.S. diplomats and troops will succeed in their attempts to convince warring religious and ethnic factions around the globe to cherish diversity if our country fails to practice what it preaches. Taking our country's ideals and interests seriously thus requires no less than a full-scale war on hate incidents.

The gentleman from Massachusetts, Mr. Delahunt?

Mr. DELAHUNT. Thank you, Mr. Chairman. I will be very brief because I am going to have to leave this hearing. I just wanted to acknowledge the presence of a leader on hate crimes from Massachusetts—Professor Jack McDevitt, whose testimony I am sure will be well received and with whom I worked in my former career as a district attorney. I think that we in Massachusetts can be very proud of leading the Nation on these issues at the State level.

I would also acknowledge a former colleague, District Attorney Devine from Chicago, who I know will provide a perspective from the State level. I think it is necessary and important to understand that the States in many cases have played the leading role in dealing with hate crimes and have a rightful place in dealing with this issue that plagues society.

Chairman HYDE. The gentleman from Virginia.

Mr. GOODLATTE. I have no statement.

Chairman HYDE. The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Mr. Chairman, I am very proud to be a sponsor of the bill and look forward to the testimony.

Chairman HYDE. Mr. Rothman of New Jersey.

Mr. ROTHMAN. Very briefly, I am proud to be a cosponsor of this legislation. Fighting hate crimes is the essence of who we are as Americans. We were founded as a Nation by religious refugees who came here presumably to seek religious freedom in America. There is a role for a national set of values in addition to those by the States. We have a national set of values that we try to teach to our children and inculcate into every man and woman in our country so that we can have a free and tolerant society. I look forward to the testimony today.

Chairman HYDE. I thank the committee for its cooperation. I see Mr. Nadler has come in. Do you have an opening statement, Mr. Nadler?

Mr. NADLER. Yes, Mr. Chairman. I am proud to be an original cosponsor of this act. I hope this committee will act swiftly to approve this critically important legislation. I do, however, have mixed feelings about this hearing. While I am pleased that there is strong bipartisan support for this type of legislation and I am pleased that this hearing is being held today, I am deeply troubled by the need for this bill and by the tragic situation that makes the bill necessary.

Hate crimes in America continue to be a serious problem, with over 8,700 total incidents being reported to the FBI in a single year. The FBI reported that there were more than 1200 victims of hate crimes based on sexual orientation. In January 1996, two men in Houston, Texas, stabbed a gay man 35 times, killing him. Evidence showed that the assailants were outspoken opponents of gay rights who had traveled to Houston in part to commit targeted anti-gay violence.

In the same year the FBI reports that there were 1,535 victims of hate crimes based on religion and of that amount, tragically, 1,209 were victims of antisemitic hate crimes. I am particularly disturbed that more than 900 of the Nation's hate crimes occurred in New York State. In the same year more than 5,300 hate crimes were based on race. Keep in mind that these numbers are based only on limited reporting data. I fear the real problem is actually much worse than even these terrible statistics suggest.

It is absolutely critical that we take effective steps to address the violent bigotry of hate crimes. These crimes deserve special attention because the victims of hate crimes are not only the one or two people involved, but whole communities that may feel intimidated or made to feel vulnerable by a specific action. We have often seen an isolated incident explode into widespread community tension. These crimes often strike at the heart of what we value most and deeply affect whole segments of our society. They can fragment communities and stir up feelings of anger that often lead to further acts of violence. Since these crimes can have such devastating and lasting effects on victims and on the communities from which they come, it is entirely appropriate to involve Federal prosecutors and

Federal resources. We ought to make it easier for Federal investigators to aid State and local law enforcement efforts.

Furthermore, many States lack comprehensive hate crime laws and FBI statistics show that the incidence of hate crimes reported continues to be unacceptably high although rates of most violent crimes are decreasing. Clearly more must be done to combat hate crimes. I believe this legislation is a good step in that direction.

I have also introduced legislation of my own, H.R. 2959, the Bias Crimes Compensation Act, which would provide a civil claim for individuals who are victims of hate crimes. This bill would also establish a right for all individuals in the United States to be free from bias motivated crimes of violence. If any person acted to deprive another of this right, they would be liable for compensatory damages. I believe that would be an appropriate companion bill to the Hate Crimes Prevention Act we are considering today. I urge this committee to seriously consider this proposal as well.

Creating tougher penalties, expanding Federal authority and providing civil claims may all help prosecutors punish those who commit hate crimes. I fear we must also address the fundamental bigotry that leads to these crimes. We should support hate crime prevention programs like those sponsored by the Anti-Defamation League. We should fund special training for law enforcement professionals, teach tolerance and diversity in our schools, and confront head on the daily prejudice that we see in our communities. There is no simple solution to this problem. I believe we must adopt a comprehensive multi-level approach to combat racism, sexism and other forms of discrimination that unfortunately lead to violent hate crimes.

I looked forward to hearing from our witnesses and any ideas they may have to reduce the number of hate crimes in America. Again, I hope the committee will act quickly to pass this critically important legislation.

Chairman HYDE. Our first witness this morning is the Acting Assistant Attorney General for Civil Rights, Mr. Bill Lann Lee. Mr. Lee is a graduate of Yale University and Columbia University Law School. Before his appointment at the Department of Justice, Mr. Lee served as Western Regional Counsel for the NAACP Legal Defense and Education Fund. He began his legal career at the Legal Defense Fund in New York as associate counsel in 1974. In 1983, he joined the Center for Law in the Public Interest and served for 5 years as a supervising attorney for civil rights litigation.

In 1988, he rejoined the Legal Defense Fund. Moreover, he served as an adjunct professor of political science at Fordham University and as counsel to the Asian American Legal Defense and Education Fund.

We welcome Mr. Lee. Your written statement will be made a part of the record. We would like you, if you could, to make an effort to summarize your statement in 5 minutes. We certainly will not hold you to that, but you know our hopes anyway.

Mr. Lee?

STATEMENT OF BILL LANN LEE, ACTING ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, WASHINGTON, DC

Mr. LEE. Mr. Chairman, thank you for your high hopes.

Mr. Chairman, members of the committee, thank you for the opportunity to testify today regarding H.R. 3081, the Hate Crimes Prevention Act of 1997. The Clinton administration very much appreciates your decision to hold this hearing. President Clinton publicly endorsed this proposal last November during the White House Conference on Hate Crimes, and he and the Attorney General continue strongly to support it.

Today's hearing is an important step forward in our Nation's battle against bigotry. For many years, members of this committee have recognized that hate crimes have no place in a civilized society, regardless of the race, religion, ethnicity, sexual orientation, gender or disability of the victim. Congressional efforts to address hate crimes always have been bipartisan, with this committee at the forefront of those efforts, playing a leadership role, of which it should be proud.

In 1990 and 1994, respectively, this committee strongly supported the enactment of the Hate Crimes Statistics Act and the Hate Crimes Sentencing Enhancement Act. In 1996, the committee responded in a time of great national need by quickly endorsing the Church Arson Prevention Act. I am hopeful that you will respond once again to this call for a stronger Federal stand against hate crimes and that you will join law enforcement officials and community leaders from across the country in support of the bill now before you.

The Hate Crimes Prevention Act of 1997 enjoys bipartisan support in both Houses. If enacted, it will continue the proud tradition of forceful congressional action to eradicate hate crimes. I have made the Nation's battle against hate crimes one of my top priorities as Acting Assistant Attorney General for Civil Rights.

Just a few weeks ago, I was in Texas meeting with Federal and local law enforcement officials regarding the recent murder of Mr. James Byrd, an African American man allegedly dragged to his death in Jasper County by three men with apparent ties to white supremacist groups. I know from firsthand experience, overseeing the Federal prosecution of hate crimes, how such hate filled acts of violence divide our communities, intimidate our most vulnerable citizens and damage our collective spirit. Our long-term goal must be to prevent hate crimes by addressing bias before it manifests itself in violent criminal activity. In the meantime, however, it is imperative that we have the law enforcement tools necessary to ensure that when hate crimes do occur, the perpetrators are identified and swiftly brought to justice. This is precisely the reason the administration supports this bill.

The principal Federal hate crimes statute, 18 USC section 245, prohibits certain hate crimes committed on the basis of race, color, religion or national origin. Despite its undeniable usefulness in a limited set of cases, the current statute is deficient in two essential respects. First, the current statute requires the government to prove that the defendant committed an offense not only because of the victim's race, color, religion or national origin, but also because

of the victim's participation in one of six narrowly defined federally protected activities. This extra intent requirement, which was written into the law some 30 years ago when the statute was first enacted, is no longer appropriate in our modern society.

Second, the current statute provides no coverage whatsoever of violent hate crimes committed because of the victim's sexual orientation, gender or disability. Together, these limitations have prevented the Federal Government from working with State and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes.

My written testimony includes descriptions of several cases in which the limitations of the current statute have prevented the Federal Government from effectively serving its proper backstop role in the investigation and prosecution of violent hate crimes.

I would like, heeding your call, to talk about only one of them. In 1994, in Fort Worth, Texas, three white supremacists went on a racially motivated crime spree in which they targeted and assaulted African Americans. In one incident, the three perpetrators knocked down an African American man, knocked him unconscious as he stood near a bus stop. The Federal Government prosecuted the three men under 18 USC section 245, when State and local prosecutors did not bring State criminal charges. But the jury acquitted all three defendants of Federal civil rights charges. Some of the jurors revealed after the trial that although the evidence clearly proved that the assaults were motivated by racial animus, there was no indication that the victim's participation in a federally protected activity, as required by the current law, was an additional motivation for the defendants' conduct.

The Hate Crimes Prevention Act of 1997 would amend 18 USC section 245 to address the problems I have outlined. In cases involving racial, religious or ethnic violence, the bill would prohibit the intentional infliction of bodily injury without regard to the victim's participation in one of the six specifically enumerated federally protected activities. In cases involving violent hate crimes based on the victim's sexual orientation, gender or disability, the bill would prohibit intentional infliction of bodily injury whenever the incident involved or affected interstate commerce.

No longer would Federal criminal civil rights jurisdiction hinge upon whether a racial beating occurs on a public sidewalk versus a private parking lot. No longer would those who target and assault others because of their race be able to evade prosecution simply because their victims were not enrolling in a public school, using a place of public accommodation or participating in any of the six federally protected activities at the time they were assaulted.

No longer would the Federal Government be without power to work with State and local officials in the investigation and prosecution of hate-filled people who affect interstate commerce by committing violent hate crimes motivated by the sexual orientation, gender or disability of the victims.

Violent hate crimes committed because of the victim's sexual orientation, gender or disability pose a serious problem in this country. Although acts of violence committed against women, for example, often have been viewed as personal attacks rather than as hate

crimes, many people have come to understand that a significant number of women are exposed to terror, brutality, serious injury or even death because of their gender. Congress recognized this just a few years ago when it passed the Violence Against Women Act and again when it passed the Hate Crimes Sentencing Enhancement Act, which included gender-motivated crimes in the statutory definition of hate crimes.

The Hate Crimes Sentencing Enhancement Act also included crimes motivated by the victim's disability within the definition of hate crimes. Over the past decade, Congress has shown a consistent and durable commitment to the protection of persons with disabilities. State and local law enforcement agencies have reported thousands of hate crimes against gays and lesbians to the FBI since the enactment of the Hate Crimes Sentencing Enhancement Act of 1994.

In 1996 alone, State and local agencies reported 1256 hate crimes motivated by the sexual orientation of the victim, a figure that may very well understate the actual number of such incidents in this country. Yet 18 USC section 245 does not reach violent hate crimes based on sexual orientation.

I want to emphasize that State and local law enforcement agencies would continue to play the primary role in the enforcement of the laws against hate crimes and the investigation and prosecution of all types of hate crimes.

From 1992 through 1997, the Department of Justice brought a total of only 33 Federal hate crimes prosecutions under 18 USC section 245, an average of fewer than six per year. We predict that the enactment of the Hate Crimes Prevention Act of 1997 would result in only a modest increase in the number of hate crimes prosecutions brought each year by the Federal Government. Our partnership with State and local law enforcement would continue with State and local prosecutors continuing to take the lead in the great majority of cases. Concurrent Federal jurisdiction is necessary only to permit joint State-Federal investigations and to authorize Federal prosecutions in rare circumstances. Although the increase in the number of Federal prosecutions we would bring pursuant to an amended section 245 would likely be modest, the increase in our ability to work effectively as partners with State and local law enforcement would be great.

Congress has recognized repeatedly that the Federal Government has a strong interest in fighting hate crimes. Just 2 years ago Congress passed unanimously the Church Arson Prevention Act of 1996, bipartisan legislation that provides a strong precedent for the structure of the bill now before the committee. Congress passed the Church Arson Prevention Act after discovering that the then-existing Federal laws pertaining to church arsons contained unnecessarily onerous jurisdictional requirements. Analogous to the structure set forth in H.R. 3081, the Church Arson Prevention Act does not require proof of an interstate commerce element in church arson cases involving racial or ethnic motivation. The changes in Federal law achieved through the enactment of the Church Arson Prevention Act have been largely responsible for the remarkable success of the National Church Arson Task Force, which in partnership with State and local officials has solved church arsons in

States all across the country at more than double the usual arrest rate in arson cases.

We believe that the enactment of H.R. 3081 would have similar beneficial effects upon the ability of Federal and State law enforcement agencies to work together to solve and prevent a wide range of violent hate crimes committed on the basis of race, color, religion, national origin, sexual orientation, gender or disability.

This bill is a thoughtful, measured response to a critical problem facing our Nation. We at the Department of Justice look forward to working with the committee as it considers this important legislation. Thank you. I would be happy to answer any questions, Mr. Chairman.

[The prepared statement of Mr. Lee follows:]

PREPARED STATEMENT OF BILL LANN LEE, ACTING ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, WASHINGTON, DC

Mr. Chairman, Members of the Committee, thank you for the opportunity to testify today regarding H.R. 3081, the Hate Crimes Prevention Act of 1997. The Clinton Administration very much appreciates your decision to hold this hearing. President Clinton publicly endorsed the Hate Crimes Prevention Act last November during the White House Conference on Hate Crimes, and he and the Attorney General continue strongly to support it.

The battle against hate crimes always has been bipartisan, and this Committee always has been at the forefront of that battle. Members of this Committee have long recognized that hate crimes have no place in a civilized society, regardless of the race, religion, ethnicity, sexual orientation, gender, or disability of the victims. In 1990 and 1994, respectively, the Committee strongly supported the enactment of the Hate Crimes Statistics Act and the Hate Crimes Sentencing Enhancement Act. In 1996, the Committee responded in a time of great national need by quickly endorsing the Church Arson Prevention Act. I am hopeful that you will respond once again to this call for a stronger federal stand against hate crimes and that you will join law enforcement officials and community leaders from across the country in support of the bill now before you. The Hate Crimes Prevention Act of 1997 enjoys bipartisan support in both the House and the Senate. If enacted, this bill will continue the proud tradition of forceful Congressional action to eradicate hate crimes.

I have made the Nation's battle against hate crimes one of my top priorities as Acting Assistant Attorney General for Civil Rights. Just a few weeks ago, I was in Texas meeting with federal and local law enforcement officials regarding the recent murder of Mr. James Byrd, an African-American man allegedly dragged to his death in Jasper County by three men with apparent ties to white supremacist groups. I know from first-hand experience overseeing the federal investigation and prosecution of hate crimes how such hate-filled acts of violence divide our communities, intimidate our most vulnerable citizens, and damage our collective spirit. All of us working together—at the federal, state, local, and community levels—must redouble our efforts to rid our society of hate crimes.

Throughout the past year, the Attorney General has demonstrated her steadfast commitment to the battle against hate crimes through the planning and implementation of her National Anti-Hate Crime Initiative. The centerpiece of the Attorney General's initiative has been the formation in each of the 93 federal judicial districts of a working group consisting of local community leaders and federal, state, and local law enforcement officials. The local working groups are charged, among other tasks, with improving coordination, community involvement, training, education, data collection, and prevention.

Our long term goal must be to prevent hate crimes by addressing bias before it manifests itself in violent criminal activity. In the meantime, however, it is imperative that we have the law enforcement tools necessary to ensure that, when hate crimes do occur, the perpetrators are identified and swiftly brought to justice. That is why the Administration urges the prompt enactment of H.R. 3081.

A. OVERVIEW

The principal federal hate crimes statute, 18 U.S.C. §245, prohibits certain hate crimes committed on the basis of race, color, religion, or national origin. Despite its undeniable usefulness in a limited set of cases, the current statute is deficient in two essential respects. First, the current statute requires the government to prove

that the defendant committed an offense not only because of the victim's race, color, religion, or national origin, but also because of the victim's participation in one of six narrowly defined "federally protected activities" specifically enumerated in the statute. Second, the current statute provides no coverage whatsoever for violent hate crimes committed because of bias based on the victim's sexual orientation, gender, or disability. Together, these limitations have prevented the federal government from working with state and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes. In some cases, they have precluded entirely the vindication of the federal interest in fighting hate-based violence.

Hate crimes statistics reported to the FBI by state and local law enforcement agencies make clear that we have a significant hate crimes problem in this country. Many of the hate crimes that have been brought to the attention of the federal government have involved bias against gays and lesbians, women, and people with disabilities. Many others have involved acts of racial or ethnic violence committed against victims who were not participating in any of the six specifically enumerated "federally protected activities" at the time of the crimes.

The Hate Crimes Prevention Act of 1997 would amend 18 U.S.C. § 245 to address each of the statute's jurisdictional limitations noted above. In cases involving racial, religious, or ethnic violence, the bill would prohibit the intentional infliction of bodily injury without regard to the victim's participation in one of the six specifically enumerated "federally protected activities." In cases involving violent hate crimes based on the victim's sexual orientation, gender, or disability, the bill would prohibit the intentional infliction of bodily injury whenever the incident involved or affected interstate commerce. These amendments to 18 U.S.C. § 245 would permit the federal government to work in partnership with state and local officials in the investigation and prosecution of cases that implicate the significant federal interest in eradicating hate-based violence.

It must be emphasized that state and local law enforcement agencies would continue to play the principal role in the investigation and prosecution of all types of hate crimes following the enactment of H.R. 3081. From 1992 through 1997, the Department of Justice brought a total of only 33 federal hate crimes prosecutions under 18 U.S.C. § 245—an average of fewer than six per year. We predict that the enactment of the Hate Crimes Prevention Act of 1997 would result in only a modest increase in the number of hate crimes prosecutions brought each year by the federal government. Our partnership with state and local law enforcement would continue, with state and local prosecutors continuing to take the lead in the great majority of cases. Concurrent federal jurisdiction is necessary only to permit joint state-federal investigations and to authorize federal prosecution in rare circumstances. Although the increase in the number of federal prosecutions we would bring pursuant to an amended 18 U.S.C. § 245 would likely be modest, the increase in our ability to work effectively as partners with state and local law enforcement would be great.

B. CURRENT FEDERAL LAW AND THE NEED FOR EXPANDED JURISDICTION

1. The "Federally Protected Activity" Requirement of 18 U.S.C. § 245

18 U.S.C. § 245(b)(2) is the principal federal hate crimes statute. It prohibits the use of force, or threat of force, to injure, intimidate, or interfere with (or to attempt to injure, intimidate, or interfere with) "any person because of his race, color, religion or national origin" and because of his participation in any of six "federally protected activities" specifically enumerated in the statute. The six enumerated "federally protected activities," written into the law 30 years ago when Congress first enacted the statute, are: (A) enrolling in or attending a public school or public college; (B) participating in or enjoying a service, program, facility or activity provided or administered by any state or local government; (C) applying for or enjoying employment; (D) serving in a state court as a grand or petit juror; (E) traveling in or using a facility of interstate commerce; and (F) enjoying the goods or services of certain places of public accommodation.

Federal jurisdiction exists under 18 U.S.C. § 245 only if a crime motivated by racial, ethnic, or religious hatred has been committed with the intent to interfere with the victim's participation in one or more of the six federally protected activities. Even in the most blatant cases of racial, ethnic, or religious violence, no federal jurisdiction exists unless the federally protected activity requirement is satisfied. This unnecessary, extra intent requirement has limited the ability of federal law enforcement officials to work with state and local officials in the investigation and prosecution of many incidents of brutal, hate-motivated violence and has led to acquittals in several of the cases in which the Department of Justice has determined a need to assert federal jurisdiction.

The most important benefit of concurrent state and federal criminal jurisdiction is the ability of state and federal law enforcement officials to work together as partners in the investigation and prosecution of serious crimes. When federal jurisdiction does exist in the limited hate crimes contexts authorized by 18 U.S.C. §245, the federal government's resources, forensic expertise, and experience in the identification and proof of hate-based motivations often provide an invaluable investigative complement to the familiarity of local investigators with the local community and its people and customs. It is by working together cooperatively that state and federal law enforcement officials stand the best chance of bringing the perpetrators of hate crimes swiftly to justice.

The investigation now being conducted in Jasper County, Texas is an excellent example of the benefits of an effective state-federal hate crimes investigative partnership. From the time of the first reports of Mr. Byrd's death, the FBI has collaborated with local officials in an investigation that has led to the prompt indictment of three men on state capital murder charges. The resources, forensic expertise, and civil rights experience of the FBI and the Department of Justice have provided assistance of great value to local law enforcement officials.

It is useful in this regard to consider the work of the National Church Arson Task Force, which operates pursuant to jurisdiction granted by 18 U.S.C. §247 and other federal criminal statutes that have no limitations analogous to the "federally protected activity" requirement of 18 U.S.C. §245. Created two years ago to address a rash of church fires across the country, the Task Force's federal prosecutors and investigators from ATF and the FBI have collaborated with state and local officials in the investigation of each and every church arson that has occurred since January 1, 1995. The results of these state-federal partnerships have been extraordinary. Thirty-four percent of the joint state-federal church arson investigations conducted during the two-year life of the Task Force have resulted in arrests of one or more suspects on state or federal charges. The Task Force's 34% arrest rate is more than double the normal 16% rate of arrest in all arson cases nationwide, most of which are investigated by local officials without federal assistance. More than 80% of the suspects arrested in joint state-federal church arson investigations during the life of the Task Force have been prosecuted in state court under state law.[1]

Because the Department of Justice has not maintained statistics regarding the outcomes of the joint state-federal hate crimes investigations in which it has participated, we are unable to provide similarly stark statistical information regarding arrest rates in hate crimes cases. Nevertheless, we are confident that the state-federal partnerships authorized by H.R. 3081 would result in an increase in the number of hate crimes solved by arrests and successful prosecutions analogous to that achieved through joint state-federal investigations in the church arson context. We also are confident that the overwhelming majority of hate crimes prosecutions would continue to be brought in state court under state law.

In rare circumstances, the federal government must go beyond its usual role as the investigative partner of state and local law enforcement officials and bring federal criminal civil rights charges. Where state and local prosecutors fail to bring appropriate state charges, or where state law or procedure is inadequate to vindicate the federal interest in prosecuting hate crimes, it is imperative that the federal government be able to step in and bring effective federal prosecutions. Unfortunately, the double intent requirement of 18 U.S.C. §245 has precluded the Department of Justice from performing its proper backstop role with regard to several heinous hate crimes.

The Department of Justice brought federal hate crimes prosecutions under 18 U.S.C. §245 in each of the following cases when state and local prosecutors declined to bring prosecutions under state law. In each case, the Department lost at trial due to the statute's "federally protected activity" requirement.

- In 1994, a federal jury in Fort Worth, Texas acquitted three white supremacists of federal criminal civil rights charges arising from unprovoked assaults upon African-Americans, including one incident in which the defendants knocked a man unconscious as he stood near a bus stop. Some of the jurors revealed after the trial that although the assaults were clearly motivated by racial animus, there was no apparent intent to deprive the victims of the right to participate in any "federally protected activity." The government's

[1] As of July 14, 1998, state and federal officials have arrested a total of 296 suspects in joint state-federal investigations of church fires occurring since January 1, 1995. State prosecutors have brought charges in state court against 238 of these suspects (80.4%), while federal prosecutors have brought charges in federal court against 58 (19.6%).

proof that the defendants went out looking for African-Americans to assault was insufficient to satisfy the requirements of 18 U.S.C. §245.

- In 1982, two white men chased a man of Asian descent from a night club in Detroit and beat him to death. The Department of Justice prosecuted the two perpetrators under 18 U.S.C. §245, but both were acquitted despite substantial evidence to establish their animus based on the victim's national origin. Although the Department has no direct evidence of the basis for the jurors' decision, it appears that the government's need to prove the defendants' intent to interfere with the victim's exercise of a federally protected right—the use of a place of public accommodation—was the weak link in the prosecution.
- In 1980, a notorious serial murderer and white supremacist shot and wounded an African-American civil rights leader as the civil rights leader walked from a car toward his room in a motel in Ft. Wayne, Indiana. The Department of Justice prosecuted the shooter under 18 U.S.C. §245, alleging that he committed the shooting because of the victim's race and because of the victim's participation in a federally protected activity, *i.e.* the use of a place of public accommodation. The jury found the defendant not guilty. Several jurors later advised the press that although they were persuaded that the defendant committed the shooting because of the victim's race, they did not believe that he also did so because of the victim's use of the motel.

In each of these examples, one or more persons committed a heinous act of violence clearly motivated by the race, color, religion, or national origin of the victim. In each instance, local prosecutors failed to bring state criminal charges. Yet in each case, the extra intent requirement of 18 U.S.C. §245—that a hate crime be committed because of the victim's participation in one of the federally protected activities specifically enumerated in the statute—prevented the Department of Justice from vindicating the federal interest in the punishment and deterrence of hate-based violence.

In several cases in recent years, the Department of Justice has sought to satisfy the federally protected activity requirement by alleging that hate crimes occurred on public streets or sidewalks—*i.e.*, while the victims were using "facilities" provided or administered by a State or local government. *See* 18 U.S.C. §245(b)(2)(B). The Department has used this theory successfully to prosecute the stabbing death of Yankel Rosenbaum in Brooklyn (Crown Heights), New York and the racially-motivated shooting of three African-American men on the streets of Lubbock, Texas.[2] Although the "streets and sidewalks" theory has enabled the Department to reach some bias crimes that occur in public places, these prosecutions remain subject to challenge. In the Lubbock case, for example, the defendants appealed their convictions, arguing that public streets and sidewalks are not "facilities" that are "provided or administered" by a state subdivision within the meaning of 18 U.S.C. §245(b)(2)(B). The United States Court of Appeals for the Fifth Circuit recently upheld the Lubbock convictions in a short, unpublished opinion, but an appeal on similar grounds in the Crown Heights case is now pending before the United States Court of Appeals for the Second Circuit.

The "federally protected activity" requirement of 18 U.S.C. §245 can lead to truly bizarre results. Federal jurisdiction is likely to be upheld when a racially-motivated assault occurs on a public sidewalk. But federal law enforcement officials may lack authority to work as partners with state and local officials if the same incident occurs in a private parking lot across the street. Similarly, our jurisdiction to respond to a racially-motivated attack that occurs in front of a convenience store may depend on whether or not the convenience store has a video game inside. (The presence of a video game would likely qualify the store as a "place . . . of entertainment" within the meaning of 18 U.S.C. §245(b)(2)(F).) The federal government's authority to participate in state-federal investigative partnerships, and to step in and play a backstop role in rare circumstances, should not hinge upon such unnecessary, anachronistic distinctions.

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[2] The Department of Justice brought federal civil rights charges against two defendants in the Crown Heights case after the state failed to charge one of the defendants in state court and the state's case against the second defendant ended in an acquittal. The Depsrtment brought federal charges against three defendants in the Lubbock case when federal and local prosecutors, who had collaborated throughout the investigation, sgreed that the procedures and sentences available in federal court were significantly better suited to the interests of law enforcement, of the victims of the crime, and of the entire affected community than were those available in state court.

2. Violent Hate Crimes Based on Sexual Orientation, Gender, or Disability

18 U.S.C. §245, in its current form, does not prohibit hate crimes committed because of bias based on the victim's sexual orientation, gender, or disability.

a. Sexual Orientation

Statistics gathered by the federal government and private organizations indicate that a significant number of hate crimes based on the sexual orientation of the victim are committed every year in the United States. Specifically, data collected by the FBI pursuant to the Hate Crimes Statistics Act indicates that 1,256 bias incidents based on the sexual orientation of the victim were reported to local law enforcement agencies in 1996; that 1,019 such incidents were reported in 1995; and that 677 and 806 such incidents were reported in 1994 and 1993, respectively. The National Coalition of Anti-Violence Programs (NCAVP), a private organization that tracks bias incidents based on sexual orientation, reported 2,529 such incidents in 1996, 2,395 in 1995; 2,064 in 1994; and 1,813 in 1993.

Even the higher statistics reported by NCAVP may significantly understate the number of hate crimes based on sexual orientation that actually are committed in this country. Many victims of anti-lesbian and anti-gay incidents do not report the crimes to local law enforcement officials because they fear that they would receive an insensitive or hostile response or that they would be physically abused or otherwise mistreated. According to the NCAVP survey, 12% of those who reported hate crimes based on sexual orientation to the police in 1996 stated that the police response was verbally or physically abusive.

Despite the prevalence of violent hate crimes committed on the basis of sexual orientation, such crimes are not covered by 18 U.S.C. §245 unless there is some independent basis for federal jurisdiction, such as race-based bias. Accordingly, the federal government is without authority to work in partnership with local law enforcement officials, or to bring federal prosecutions, when gay men or lesbians are the victims of murders or other violent assaults because of bias based on their sexual orientation.

b. Gender

Although acts of violence committed against women traditionally have been viewed as "personal attacks" rather than as hate crimes, many people have come to understand that a significant number of women "are exposed to terror, brutality, serious injury, and even death because of their gender."[3] Indeed, Congress, through the enactment of the Violence Against Women Act (VAWA) in 1994, has recognized that some violent assaults committed against women are bias crimes rather than mere "random" attacks. The Senate Report on VAWA, which created a federal civil cause of action for victims of gender-based hate crimes, stated:

> The Violence Against Women Act aims to consider gender-motivated bias crimes as seriously as other bias crimes. Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims are reduced to symbols of hatred; they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated. "Placing this violence in the context of the civil rights laws recognizes it for what it is—a hate crime."

Senate Report No. 103–138 (1993) (quoting testimony of Prof. Burt Neuborne).

VAWA provides private parties a broad civil remedy for violence against women motivated by gender-based bias. See 42 U.S.C. §13981. However, VAWA's two criminal provisions regarding violence against women provide extremely limited coverage. Specifically, VAWA's prohibition on interstate domestic violence, 18 U.S.C. §2261, is limited to violence against a defendant's "spouse or intimate partner" and requires that the defendant travel across a state line. VAWA's other criminal provision, 18 U.S.C. §2262, prohibits the violation of a "protection order" if the defendant travels across state lines with the intent to engage in conduct that violates that order.

The structure of VAWA's criminal provisions gives rise to at least two important concerns. First, because of VAWA's victim-based limitation—the requirement that the victim be a "spouse or intimate partner"—VAWA does not give the Department of Justice sufficient authority adequately to address a significant number of violent gender-motivated crimes. Serial rapists, for example, fall outside the reach of

[3] Statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund, *Women and Violence: Hearing Before the Senate Judiciary Committee*, 101st Congress, 2nd Sess. 62 (1990).

VAWA's criminal provisions even if their crimes are clearly motivated by gender-based hate and even if they operate interstate. Second, because VAWA's criminal provisions contain no requirement that the violence be motivated by gender-based bias, the statute does not authorize the federal government to impose on the defendant the particular stigma associated with a conviction for a gender-based crime.

The majority of states do not have statutes that specifically prohibit gender-based hate crimes. Although all 50 states have statutes prohibiting rape and other crimes typically committed against women, only 17 have hate crimes statutes that include gender among the categories of prohibited bias motives.

The federal government should have jurisdiction, as envisioned by H.R. 3081, to work together with state and local law enforcement officials in the investigation of violent gender-based hate crimes and, where appropriate in rare circumstances, to bring federal prosecutions aimed at vindicating the strong federal interest in combating the most heinous gender-based crimes of violence.

It is important to emphasize in this regard that the enactment of H.R. 3081 would not result in the federalization of all sexual assaults or acts of domestic violence. Rather, as discussed below in greater detail, the language of the bill itself, and the manner in which the Department of Justice would interpret that language, would ensure that the federal government would strictly limit its investigations and prosecutions of violent gender-based hate crimes to those that implicate the greatest federal interest. As is the case with other categories of hate crimes, state and local authorities would continue to prosecute virtually all gender-motivated hate crimes. One principal reason for this is that while state and local prosecutors are required to prove only that the perpetrator committed the act alleged in the indictment, federal prosecutors would be required to prove not only that the perpetrator committed the act alleged, but also that the perpetrator did so because of gender-based bias.

c. Disability

Congress has shown a consistent and durable commitment over the past decade to the protection of persons with disabilities from discrimination based on their disabilities. Beginning with the 1988 amendments to the Fair Housing Act,[4] and culminating with the enactment of the Americans with Disabilities Act of 1990, Congress has extended civil rights protections to persons with disabilities in many traditional civil rights contexts.

Concerned about the problem of disability-based hate crimes, Congress also amended the Hate Crimes Statistics Act in 1994 to require the FBI to collect information about such hate-based incidents from state and local law enforcement agencies. The FBI has not yet reported any statistics generated pursuant to this recent legislative directive, but other available information indicates that hate crimes based on disability occur all too frequently.

The Department of Justice believes that the federal interest in working together with state and local officials in the investigation and prosecution of hate crimes based on disability is sufficiently strong to warrant amendment of 18 U.S.C. § 245, as set forth in H.R. 3081, to include such crimes when they result in bodily injury and when federal prosecution is consistent with the Commerce Clause.

C. H.R. 3081, THE HATE CRIMES PREVENTION ACT OF 1997

1. Amendments to 18 U.S.C. § 245

The Hate Crimes Prevention Act of 1997 would create a three-tiered system for the federal prosecution of hate crimes under 18 U.S.C. § 245, as follows:

- First, it would leave 18 U.S.C. § 245(b)(2) as it is now. As discussed above, 18 U.S.C. § 245(b)(2) prohibits the intentional interference, or attempted interference, with a person's participation in one of six specifically enumerated "federally protected activities" on the basis of the person's race, color, religion, or national origin. No showing of bodily injury is required to prove a misdemeanor offense under this section; to prove a felony, the government must prove either that bodily injury or death resulted or that the offense included the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire.
- Second, it would add a new provision, codified at 18 U.S.C. § 245(c)(1), that would prohibit the intentional infliction of bodily injury on the basis of race, color, religion, or national origin. Unlike 18 U.S.C. § 245(b)(2), this new provision would not require a showing that the defendant committed the offense

[4] Congress amended the Fair Housing Act in 1988 to grant the Attorney General authority to prosecute those who use force or threats of force to interfere with the right of a person with a disability to obtain housing.

because of the victim's participation in a federally protected activity. However, an offense under the new 18 U.S.C. §245(c)(1) would be prosecuted as a felony only, and a showing either of bodily injury or of an attempt to cause bodily injury through the use of fire, a firearm, or an explosive device would be required. Other attempts would not constitute offenses under this section.

- Third, it would add another new provision, codified at 18 U.S.C. §245(c)(2), that would prohibit the intentional infliction of bodily injury (or an attempt to inflict bodily injury through the use of fire, a firearm, or an explosive device) on the basis of religion, gender, sexual orientation, or disability. Like 18 U.S.C. §245(c)(1), this provision would authorize the prosecution of felonies only and would exclude most attempts, while omitting the "federally protected activity" requirement of 18 U.S.C. §245(b)(2). But unlike 18 U.S.C. §245(c)(1), this second new provision would require proof of a Commerce Clause nexus as an element of the offense. Specifically, the government would have to prove "that (i) in connection with the offense, the defendant or the victim travels in interstate or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in activity affecting interstate or foreign commerce; or (ii) the offense is in or affects interstate or foreign commerce."

2. Interstate Commerce Requirement

While there is a clear need to extend the scope of 18 U.S.C. §245 to include violent hate crimes motivated by biases against a person's sexual orientation, gender, or disability, the Department of Justice believes that the statutory amendments should be effected in a manner that is respectful of the criminal law enforcement prerogatives of the states. The interstate commerce element contained in the new 18 U.S.C. §245(c)(2) would ensure that federal prosecutions for hate crimes based on sexual orientation, gender, or disability would be brought only in cases in which the federal interest is most clear. It is therefore appropriate to proceed in the measured fashion set forth in H.R. 3081.

The interstate commerce element also would ensure that hate crimes prosecutions brought under the new 18 U.S.C. §245(c)(2) would not be mired in constitutional litigation concerning the scope of Congress' power under the enforcement provisions of the Thirteenth and Fourteenth Amendments. The Department of Justice is confident that satisfaction of the interstate commerce element, which appears in similar form in numerous other federal criminal statutes, would insulate these new types of prosecutions from constitutional challenges to which they otherwise might be subjected.

The Church Arson Prevention Act of 1996 provides a strong precedent for the structure of the bill now before the Committee. Congress passed the Church Arson Prevention Act after discovering that then-existing federal laws pertaining to church arson cases contained unnecessarily onerous jurisdictional requirements. Consistent with its constitutional authority, Congress amended the church arson statute, 18 U.S.C. §247, to limit to church arson cases involving religious motivation its requirement that a nexus to interstate commerce be proved. Analogous to the structure set forth in H.R. 3081, the Church Arson Prevention Act does not require proof of an interstate commerce element in church arson cases involving racial or ethnic motivation. The changes in federal law achieved through the enactment of the Church Arson Prevention Act have been largely responsible for the remarkable success of the National Church Arson Task Force, which, as described above, has worked in partnership with state and local officials to solve church arson cases at more than double the usual rate of arrest in all arson cases nationwide.

3. Federalization

The Department of Justice has carefully reviewed H.R. 3081 and has concluded that its enactment would neither result in a significant increase in federal hate crimes prosecutions nor impose an undue burden on federal law enforcement resources. The language of the bill itself, as well as the manner in which the Department would interpret that language, would ensure that the federal government would strictly limit its investigations and prosecutions of hate crimes—including those based on gender—to the small set of cases that implicate the greatest federal interest.

In this regard, the express language of the bill contains several important limiting principles. First, the bill requires proof that an offense was motivated by hatred based on race, color, national origin, religion, sexual orientation, gender, or disability; as it has in the past, this requirement would continue to limit the pool of potential federal cases to those in which the evidence of hate-based motivation is sufficient to distinguish them from ordinary state law cases. Second, the bill excludes

misdemeanors and limits federal hate crimes based on sexual orientation, gender, or disability to those involving bodily injury (and a limited set of attempts to cause bodily injury); these limitations would narrow the set of newly federalized cases to truly serious offenses. Third, the bill's Commerce Clause element requires proof of a nexus to interstate commerce in cases involving conduct based on bias covered by any of the newly protected categories; this requirement would limit federal jurisdiction in these categories to cases that implicate interstate interests. Finally, 18 U.S.C. §245 already requires a written certification by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or a specially designated Assistant Attorney General that "in his [or her] judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice" before any prosecution under the statute may be commenced, *see* 18 U.S.C. §245(a)(1); this statutory certification requirement, which would extend to all prosecutions authorized by H.R. 3081, would ensure that the Department's new areas of hate crimes jurisdiction would be asserted in a properly limited fashion.

The Department's efforts under the proposed amendments to 18 U.S.C. §245 also would be guided by Department-wide policies that would impose additional limitations on the cases prosecuted by the federal government. First, under the "backstop policy" that applies to all of the Department's criminal civil rights investigations, the Department would defer prosecution in the first instance to state and local law enforcement officials except in highly sensitive cases in which the federal interest in prompt federal investigation and prosecution outweighs the usual justifications of the backstop policy. Second, under the Department's formal policy on dual and successive prosecutions, the Department would not bring a federal prosecution following a state prosecution arising from the same incident unless the matter involved a "substantial federal interest" that the state prosecution had left "demonstrably unvindicated."

As mentioned above, over the past six years the Department of Justice has brought an average of fewer than six federal hate crimes prosecutions per year under 18 U.S.C. §245. Particularly in light of the experience of the National Church Arson Task Force, discussed above, we do not anticipate that the enactment of H.R. 3081 would result in any significant increase in these numbers.

D. CONCLUSION

We believe that the enactment of H.R. 3081 would significantly increase the ability of state and federal law enforcement agencies to work together to solve and prevent a wide range of violent hate crimes committed because of bias based on the race, color, national origin, religion, sexual orientation, gender, or disability of the victim. This bill is a thoughtful, measured response to a critical problem facing our Nation. We at the Department of Justice look forward to working with the Committee as it considers this important legislation.

Chairman HYDE. Mr. Gekas?

Mr. GEKAS. I thank the Chair. Mr. Lee, you emphasized and reemphasized several times some of the precepts of my opening statement about the necessity to recognize that the State and local law enforcement agencies have the primary responsibility in most of the cases that would arise under this act or any of its predecessors or similar legislation passed in the past. You state rather emphatically that even the passage of this legislation would result in only a modest increase in Federal involvement anyway in these kinds of cases, still relying on the State and local law enforcement agencies to take the lead. In view of that, if you say that the increase in our ability to work effectively as partners with State and local law enforcement would be great, that presupposes that you now have some, you do have that cooperation, you do have that partnership, you do have the ability to crack down on the cases where it appears that the Federal Government, 33 out of some hundreds of cases would be necessary for Federal involvement. I suppose that you are saying that this bill, this act, if finally placed into law, would add more of a symbolic and aura type of enhancement of this partnership which you say already exists.

I am giving you a great opening. That is a softball question. You may proceed.

Mr. LEE. I will take those whenever I can get them, sir.

We are not talking about symbolism. We are talking about practical law enforcement. Right now if you look at the situation in Jasper, if you look closely at what has happened as the Federal Government, through the FBI, the United States Attorney's Office and Civil Rights Division has helped local law enforcement in Jasper investigate that crime. That is the kind of assistance that the Federal Government is able to provide in terms of expertise, resources, forensic expertise, expertise in dealing with——

Mr. GEKAS. Can't you do that now?

Mr. LEE. We cannot do that in situations where we do not have jurisdiction in terms of a Federal crime. We can do that, we have done that in Jasper because we are considering that issue. But this bill will make——

Mr. GEKAS. In the Jasper case you do have the current ability to interact with State and local law enforcement; is that correct?

Mr. LEE. That is right. That is the model which we would like to extend to these other circumstances. The other circumstances are hate crimes that fall outside this double motivation requirement that I outlined that is in the (b)(2) part of section 245. Not only do you have to prove racial, religious, color, ethnic bias, but you have to prove that that individual was a victim of a hate crime because of participation in a Federal activity. We have had 30 years of enforcement under that provision. We have found it to unnecessarily limit our ability to investigate and provide assistance to State entities in a whole range of potential crimes that fall outside of that structure. But also we have no ability to provide the kind of assistance to State and local governments on the basis of gender bias, on the basis of disability bias, on the basis of sexual orientation bias. This would free us up and free up the FBI to be of better assistance to State and local authorities. But also there are some instances, I have been frank to tell you they are rare, when the Federal prosecution is necessary and in those instances, that would also be permitted.

Mr. GEKAS. It remains a fact, does it not, that if we had never conducted this hearing or never engaged in the process of speculating on the passage of this legislation, that the Federal Government would be able to, under the Attorney General's jurisdiction, initiate cooperation in the Jasper case with the local and State law enforcement agencies and has done so; is that correct?

Mr. LEE. Jasper is a pending situation. Let me just speak in general. We can do that, provide that assistance when in our best judgment there is strong evidence of a Federal law violation. But once we figure out that we do not have that anymore, let us say one of the six criteria is not met, the FBI will stop working on that. Local law enforcement will not get the benefit of the resources, the forensic expertise or the expertise of the United States Attorney's Office or the Civil Rights Division.

That is what I think this bill will do. It will allow us to render assistance in a greater set of circumstances, which I believe is completely appropriate.

Chairman HYDE. The gentleman's time has expired. The gentleman from Michigan, Mr. Conyers?

Mr. CONYERS. I want to congratulate the Assistant Attorney General on Civil Rights. His coverage was superb.

What we want to understand is the following. Cooperation is great, but the fact of the matter is that these crimes are being underprosecuted all over the place, not just at the State level but at the Federal level. Is that generally correct?

Mr. LEE. I think you have put your finger on the problem. The average district attorney's office in this country has seven employees. That includes the receptionist and the secretary. That is our first line of defense on hate crimes. They need our help. So this bill will free up Federal resources to be able to back up local authorities when they have to investigate a crime. If you can think of Jasper County, a small county which is now prosecuting a murder and now has to face the idea of investigating and mounting a prosecution of the matter involving Mr. Byrd, you will see what local law enforcement is up against. I think that, without talking too much about a pending matter, I think the resources the Federal Government has been able to give local law enforcement in that case epitomizes the manner in which the Federal Government can provide valuable backup when that is needed, because we are not talking about symbols. We are talking about law enforcement. We are talking about making law enforcement more effective.

Mr. CONYERS. It does not take a research scientist to suggest that they probably never prosecuted a case like this in Jasper in its entire history.

Now, what about the fact that most States do not even have statutes covering this, so the assumption that these matters can be taken care of by the States is totally out of the realm of possibility because they do not have the statutes that cover this. We are in a terrible situation. The fact of the matter is that under—without this law, the Feds cannot prosecute even in Jasper. You can cooperate all you want, but you cannot bring the Federal case because the reasons we have just gone over, we do not have the requisite jurisdiction, which is the object of this legislation.

Mr. LEE. Mr. Conyers, at this point we are still looking at Jasper. Our stance is, at this point, that if we had H.R. 3081, we would not have to worry whether there was Federal jurisdiction in Jasper.

Mr. CONYERS. Thank you, Mr. Lee.

Chairman HYDE. Mr. Lee, I am told that 40 States have enhancement statutes that deal with this. There is only one State, Wyoming, I guess that has nothing on this. I just have a comment.

I detect a pattern, and it is not one I disagree with, I do not disagree with the fact that there is a mistrust of certain local jurisdictions in trying these cases. That is evident from this effort to federalize what is essentially a State crime, a local crime. I do not know any State that does not have some statutes on assault and battery, that sort of thing. What you are talking about is this enhanced level of hate which gets fed into the calculus and hence should up the penalty.

It is ironic, the mistrust for the local courts and law enforcement system even transfers itself to the local Federal court, because I re-

member in the days we struggled over the Voting Rights Act trying to get legislation to permit these causes of action to be tried in the local Federal court on the theory that the same Federal law would be applied no matter where the Court was. But that was absolutely anathema. The only place in the country you can try those is in the District of Columbia U.S. Court of Appeals, meaning that is the only place that the community, the civil rights community trusts.

I am not necessarily disagreeing with it. I think it is worthy of note, this pattern of dissatisfaction, let us say, if not distrust, with local law enforcement. But in any event——

Mr. CONYERS. Mr. Chairman——

Mr. LEE. Could I add something?

Chairman HYDE. Absolutely.

Mr. LEE. The Department of Justice and the Civil Rights Division do not have a distrust of local law enforcement. As I have gone to some pains to emphasize, we think that one of the principal benefits of this act is not only that in a back stop role the Federal Government would have the ability to prosecute and the prosecution would be in a local district, but also that we would be able to help local law enforcement. We are not talking about suspicion. We are talking about working together in a partnership to make sure that an important Federal interest and State interest are both promoted.

Chairman HYDE. That is an idyllic situation. I can see local law enforcement and the Feds struggling over a given case, whose is it, who gets the collar, who gets to try the case. The Feds, if it is one that is going to get some publicity, I do not think things necessarily go that well orchestrated, but then you may know, I am sure you know more than I about interrelationships between the Feds and the local.

Mr. LEE. Mr. Chairman, I have not been here as long as you but I will say this. Based on our experience——

Chairman HYDE. I was just going to say, if you do trust local governments, as you say you do, that transfers itself to local Federal courts, then perhaps you would support legislation to permit Voting Rights Act cases to be tried in the local Federal court, not have to trek all the way up here to the District of Columbia. Or does your trust extend that far?

Mr. LEE. Well, I am trying to talk about this very important statute. I will be happy to talk about——

Chairman HYDE. I look forward to that ancillary commentary.

Mr. LEE. I think you raise an important issue. I think one can theorize that there would be a rivalry between the Federal and State prosecution, prosecutorial authorities. I think if you look at the actual record, you will see that in this area, I hope in other areas, that has not occurred. For 30 years this department has been enforcing a hate crimes statute as originally framed by section 245(b)(2). The average is 5 or six prosecutions, year in year out. It may go up; it may go down, regardless of whatever party is in power in the administration. This is not a partisan issue. This is an issue in which there has been deference to local law enforcement.

I emphasized that one useful precedent is to look at the Church Arson Prevention Act. That is a statute in which we also removed

some narrow jurisdictional requirements and what happened? What happened is that we in the Department of Justice and the FBI and ATF started working with local law enforcement to try to solve church arsons. What happened was that the arrest rate jumped to 34 percent. The average arrest rate in arsons is 16 percent. I will tell you, is there rivalry? No. Eighty percent of those church arsons in which arrests were made through joint State and Federal efforts were prosecuted in State court.

We make our decisions at the Department of Justice based on what is best for the case. In some situations, the penalty may be higher on the Federal side. In some cases, for the good of the case, it is better to proceed on the State side. And often that is the situation. Sometimes there are State statute of limitations problems that do not exist on the Federal side. Sometimes there are arcane issues about whether if you proceed on the State side there will be separate trials, you will be burdening witnesses. On the Federal side, it may be easier to get a joint trial, and it may be more effective and better for the prosecution. Those are the issues that this bill is really about.

Mr. CONYERS. Mr. Chairman, could you get a couple minutes? I would like to just pick up on a point you made that is very important.

Chairman HYDE. Sure. I will yield myself 2 additional minutes, but I want to just say to Mr. Lee, where justice is at stake I am not against options.

Mr. CONYERS. Thank you so much.

Mr. Lee, I am the author of the church arson bill. Let me tell you there was all kinds of fights over jurisdiction. The DEA, the local cops, the prosecutors, the Feds, we had horrible problems, number one. Please, let us not overemphasize cooperation. You are a cooperative Assistant Attorney General. The atmosphere is anything but cooperative. We do not have to be historians to understand why. The racism, the violence, the discrimination that is the history of our country in some parts of the Nation have not gone away. So we cannot expect cooperation.

We have got Federal involvement in Alabama, allegations of harassing of people working in voter registrations that include the FBI. I am not real anxious to say, and I think the chairman made a reference to it, to turn everything locally over to the Feds, because the Feds are people that work there, too, and come out of the system. So we have got some problems. We cannot even get the States' statistics on prosecutions of hate crimes. If you have got them, I would like you to send them to me right away. Would you like to react to that?

Mr. LEE. Certainly, Mr. Conyers. I think your leadership on this issue has been wonderful. There is a very strong role for the Federal Government. I am trying to be practical. I am trying to give you the law enforcement perspective on it. There are going to be those rare instances when the Federal Government must step forward, when the vindication of Federal rights requires that. There is no doubt about that. But this Justice Department will continue to endeavor to make sure that we will work cooperatively as much as we can.

Mr. CONYERS. We know you are a cooperatively inclined person. But the Federal Government is underprosecuting. We have got all these reports with no prosecution, so it is not just the State. It is the Feds and the State that need to get into this a lot more effectively.

I thank you for your comments. Thank you, Mr. Chairman.

Chairman HYDE. The gentleman from Florida.

Mr. CANADY. Thank you. I appreciate your testimony. A general point I would like to make has to do with the issue of Federal versus State authority. I do not want to replow the ground we have had here. In your testimony you say that although the increase in the number of Federal prosecutions we would bring pursuant to this act would likely be modest, the increase in our ability to work effectively as partners with State and local law enforcement would be great.

Could you explain to me why this bill will enhance your ability to work effectively as partners with State and local law enforcement?

Mr. LEE. No Federal jurisdiction, no FBI, no Federal resources. That is what it comes down to. It is not glamorous, it does not hit the newspapers, but these cases are worked up and solved at the investigatory phase. I think some of the——

Mr. CANADY. What you envision is cases that actually would fall within the jurisdiction and could be prosecuted, would not necessarily be prosecuted by your, by the Federal Government, but the Federal Government could be involved in the initial stages in helping make the case and assist the States. Let me ask you this, are there no circumstances under which Federal law enforcement can assist local law enforcement where there is not, has not been the commission of a Federal crime?

Mr. LEE. It would be fairly unusual. Obviously when the FBI gets requests from local law enforcement to run tests at its lab, it will comply. But what we are talking about is not just responding to a request but having a joint partnership, having, working up cases together. That is possible, and it can be enhanced.

Mr. CANADY. I think that is an important point. That raises an interesting issue, which is even broader than the context we are just looking at here today, because I think we could make a strong case for certainly making Federal resources available, subject to the discretion of the Department of Justice, in circumstances where local law enforcement is faced with a particularly difficult situation and they need assistance. That is again a different issue. That may raise other problems that would be of concern to people. I think that is something that would bear looking into, not just for this context but the broader context.

I would ask unanimous consent to place in the Record a letter that was sent to the chairman of the committee by Leonidas Ralph Mecham, Director of the Administrative Office of the United States Courts. If that could be placed in the Record, Mr. Chairman.

Chairman HYDE. Without objection, so ordered.

[The information referred to follows:]

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Washington, DC, July 21, 1998.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

Re: *H.R. 3081, the "Hate Crimes Prevention Act of 1997"*

DEAR CHAIRMAN HYDE: It is my understanding that on July 22, 1998, the House Judiciary Committee will consider H.R. 3081, the "Hate Crimes Prevention Act of 1997." While the Judicial Conference of the United States has not taken a position on the bill, this legislation does present a significant issue of federalism which is of concern to the judiciary.

We believe H.R. 3081 appears to be but the latest proposal in a trend that seeks—unwisely in our view—to expand the criminal jurisdiction of the federal courts into matters previously prosecuted exclusively in the state courts. The principal issue presented by this legislation is whether the acts of violence covered by the proposed statute, which are already criminal offenses under state law, and some of which may already be federal crimes as well, are not being adequately prosecuted and punished at the present time. In other words, is a new federal statute needed?

H.R. 3081 is extremely broad in scope. Section four of the bill would provide for federal prosecution of a significant number of crimes that are traditionally prosecuted in the state systems. For example, it would make a federal crime of *any* act resulting in the bodily injury of someone, or the attempt thereof, when it is motivated by the actual or perceived race, color, religion or national origin of *any* person.

The Judicial Conference has regularly expressed concern over the growing trend to federalize offenses that have traditionally been the responsibility of state or local criminal justice systems. On five occasions in the 1990s, the Judicial Conference has reiterated its "longstanding position that federal prosecutions should be limited to those offenses that cannot or should not be prosecuted in state courts."[1] The Judicial Conference believes that the "jurisdiction of the federal courts should be limited, complementing and not supplanting the jurisdiction of the state courts."[2] The federal judiciary has consistently urged that the prosecution of most crime should remain the responsibility of the states so that the federal criminal justice system may devote its limited resources to prosecuting those offenses that it is uniquely suited to investigate and prosecute. This would include, for example, organized crime, large narcotics conspiracies and crimes occurring in an interstate context. Unfortunately, it is apparent that Congress and the Executive Branch have not shared this view in recent years.

Circuit Judge Deanell Reece Tacha, a member of the U.S. Sentencing Commission, noted last year that, "If the period of the 1930s and 1940s can be described as the explosion of the federal administrative state, then surely the late 1980s and 1990s will go down in history as the period of explosion in the federal criminal law."[3] Last year, criminal case filings in federal courts reached 50,363,[4] the highest level since 1933. However, this statistic alone does not adequately demonstrate the increased demand on the resources of the courts due to the nature and complexity of the criminal cases and the enormous increase in the filing of drug cases in the federal courts.

The challenge is to find a way to balance the need to ensure justice to the victim of crime while preserving the integrity and efficacy of the federal criminal justice system. In a recent address, the Chief Justice discussed a principle which offers useful guidance in meeting this challenge. He refers to it as the "Lincoln-Eisenhower Test," and it is grounded in the traditional principle of federalism.[5] In the words of the Chief Justice:

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[1] September 1991 *Report of the Proceedings of the Judicial Conference of the United States*, p. 45.

[2] September 1993 *Report of the Proceedings of the Judicial Conference of the United States*, p. 51. *See also* September 1992 *Report of the Proceedings of the Judicial Conference of the United States*, p. 57, March 1993 *Report of the Proceedings of the Judicial Conference of the United States*, p. 13, and September 1997 *Report of the Proceedings of the Judicial Conference of the United States*, p. 65.

[3] Judge Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines be Drawn?*, Address Before the Federalist Society, University of Michigan Law School (April 9, 1997).

[4] 1997 Dir. Ann. Rep. 184 (Admin. Office of U.S. Courts).

[5] Chief Justice William Rehnquist, Address Before the American Law Institute (May 11, 1998) [hereinafter Address].

> It is a principle enunciated by Abraham Lincoln in the 19th Century and Dwight Eisenhower in the 20th Century: Matters that can be adequately handled by the ststes should be left to them, matters that cannot be so handled should be undertaken by the federal government. Reasonable minds will differ on how this very general maxim applies in a particular case, but the question which it implies should at least be asked.[6]

A more detailed postulation of this same principle can also be found in the *Long Range Plan for the Federal Courts*, the guiding framework to lead the federal judiciary into the 21st Century. In fact, it is the very first Recommendation of the Plan:

> Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.[7]

Unless the case for federal intervention can be clearly and convincingly made, direct expansion of federal jurisdiction should be avoided.

This, of course, does not mean that, absent exercise of direct federal intervention, Congress can take no action to address state crime problems. On the contrary, Congress has in the past made significant contributions to combating crime by providing tools and resources to the states. In fact, the Chief Justice has strongly suggested this alternative.[8] This is also the position of the Judicial Conference.[9] Federal assistance can be provided to state court systems as well as state and local law enforcement.

We urge you to proceed with caution in considering this bill. It unquestionably creates the potential for the federalization of a significant number of state crimes. We think it imperative that you debate whether this bill passes the "Lincoln-Eisenhower" test. At the same time, we urge you to consider to what extent this bill duplicates already existing federal crimes. Several existing federal civil rights laws already provide criminal penalties for certain acts of discrimination, often with a substantial increase in penalty if physical harm is caused to the victim. These laws are quite broad. Adoption of the present bill in the face of these existing federal statutes could potentially add an element of confusion and more litigation to the criminal justice process.

Our concern with the increasing proliferation of federal criminal statutes, and particularly with the principle of federalism, is not an abstract one. With its limited resources, the federal criminal justice system was never designed for, and is not capable of, being the criminal court of primary resort. There are only approximately *1,250* authorized federal judges, including magistrate judges, in the entire country, while more than *29,000* judges are authorized in the state court systems. That means that federal judges comprise just *4.2 percent* of all authorized judges nationwide. We believe a similar ratio would undoubtedly apply when comparing the number of federal and state law enforcement personnel, court clerks, probation officers, and even prison space. As in any other area, a federal court system whose grasp far exceeds its resources cannot succeed. Unfortunately, our resources are finite.

In closing, I wish to make very clear that the members of the federal judiciary, like all Americans, share a profound concern for victims of all criminal activity. However, we strongly believe that the interests of crime victims ultimately are best served by a criminal justice system which strikes the right jurisdictional balance between the federal and state courts. Preserving the integrity of our federal system will, in the long run, significantly strengthen our criminal justice system and allow it to effectively deal with crimes that truly cannot be effectively handled in the state court systems.

It is our hope that you will consider the matters set forth in this letter. If you have any questions regarding the matters discussed herein, please do not hesitate to contact me at 202/273–3000. If you prefer, you may also have your staff contact Dan Cunningham, Legislative Counsel, at 202/273–1120.

Sincerely,

LEONIDAS RALPH MECHAM, *Director.*

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[6] Id.

[7] *Long Range Plan for the Federal Courts*, Judicial Conference of the United States 23 (1995).

[8] Chief Justice William Rehnquist, Year-End Report on the Federal Judiciary (1993).

[9] In March 1993, the Judicial Conference agreed to renew efforts to "[r]everse the trend of federal prosecution of what historically have been regarded as state crimes, while supporting other efforts to address those crimes at the state level." March 1993 *Report of the Proceedings of the Judicial Conference of the United States*, p. 13.

cc: Members of the Committee on the Judiciary

Mr. CANADY. Thank you, Mr. Chairman, and I do not place this in the Record because I necessarily agree with all of the conclusions or even all of the sentiments expressed in the letter. I think it is interesting, however, in that the reference is made to something called the Lincoln-Eisenhower test, which the Chief Justice has referred to. And to quote the Chief Justice, as it is quoted in the letter, referring to this test, "It is a principle enunciated by Abraham Lincoln in the 19th century and Dwight Eisenhower in the 20th century: Matters that can be adequately handled by the States should be left to them, matters that cannot be so handled should be undertaken by the Federal Government. Reasonable minds will differ on how this very general maxim applies in a particular case, but the question which it implies should at least be asked."

I think that is a helpful perspective on this. I would commend that to the members. I would emphasize the statement that "reasonable minds can differ" on when the test is met and when it is not met.

If I could have just one additional minute.

Chairman HYDE. Without objection.

Mr. CANADY. This is a very technical question. Reading through the bill, I notice that in both subsections (c)(1) and (c)(2) reference is made to religion. That is the only category that appears in both of the sections. This is a point that also Professor Sunstein makes in his testimony. I am not clear why religion is in both sections. If you could elaborate on that.

Mr. LEE. In a nutshell it is a belts and suspenders approach. (c)(1) deals with the new section that will supplement existing (b)(2) and not have the limitation of the six protected activities. The constitutional basis for that is the 13th amendment dealing with racially- and ethnicity-based hate crimes and color hate crimes. That is supported by the 13th amendment's prohibition of badges and incidents of slavery. Some religious discrimination is also covered by that because when the 13th amendment was passed, some religions of some groups of people were considered racial in character. In order to make sure that there be no shortfall in the coverage of religious-based hate crimes, the sponsors included it in (c)(2) as well, and we believe that that is in order, as I said, the belts and suspenders approach, to have an additional constitutional basis, which is interstate commerce, as an additional basis to make sure that religious-based hate crimes are absolutely covered.

Chairman HYDE. The gentleman from Massachusetts Mr. Frank?

Mr. FRANK. Thank you. I welcome the Assistant Attorney General. I know that consistency is not a very highly rated virtue in this committee. It is a committee of many virtues but we tend to swap sides a lot. One of the issues where there has been a lot of side swapping going on has to do with overcrowding the courts. For example, I gather some on the other side are against a Federal statute on hate crimes because it might overcrowd the courts. So one of the things we might do is to allow class action suits about hate crimes to be brought into the Federal courts because many of my colleagues on the other side agree with me that we should in-

crease the incidence of Federal versus State litigation on class actions.

We have a bill which I think, without an amendment offered by my colleague from Massachusetts, would Federalize almost all class action suits. So one way to get around the objection on the other side to overcrowding the courts is to simply make them class action suits. They are not opposed to more Federal jurisdiction there. We have passed several laws out of this committee that would increase Federal jurisdiction on abortion. We have, in the area of juvenile crime, done that.

Please, Mr. Lee, today is Wednesday. You have to understand, on Mondays, Wednesdays and Fridays, my Republican colleagues are inclined to be States righters. But on Tuesdays and Thursdays, they tend to be Federalists. So part of the problem is you came on the wrong day. If you could have gotten your hearing switched to Thursday, yesterday was Tuesday, we were for federalizing jurisdiction. I yield to Alexander Hamilton—no, Thomas Jefferson today.

Chairman HYDE. I am glad you did not say James Madison. He was a little guy.

Would you tell me what day of the week you are for using, you are for States rights on tort reform and you are for transferring those to the Federal courts. Which day of the week is that for you?

Mr. FRANK. Neither. You will find, if you look at my rhetoric, that I never use arguments that I do not believe in. I have never argued that it was better to do it as a general principle, State versus Federal. I may be different than my colleagues in this regard as well. I am used to that.

The fact is that I think most of us frankly in our heart of hearts are for having public policy issues decided at that level of government where we are likeliest to agree with the outcome. There is no problem with that. I do not think, frankly, the argument for State versus Federal has nearly the force it has in today's world of instant communication that it had 200 years ago. My problem is with people who pretend to have a preference for the State versus the Federal, when they really do not.

So my answer to you is that is not for me something desideratum. Some issues it seems to me, for a combination of reasons, I think could be done federally. Some could be done on the State level. I do not have an overall philosophical preference for doing them at the State level or the Federal level.

I don't have a general sense that we have to worry about overcrowding the Federal courts or overcrowding the State courts. I differ with many of my colleagues in that I admit that. I acknowledge that. I do not pretend to have it. I will note that yesterday the sides were somewhat reversed. Some of my colleagues were using the argument of judicial economy and not overburdening the Federal courts yesterday when we were talking about civil class actions. Today we are talking about criminal hate crimes, and this side has flipped. I would ask for a moratorium on the use of that argument which almost nobody believes in.

The administrative people at the courts do. They are fairly militantly in favor of having less to do. I understand that. They are almost always for less jurisdiction. That is understandable. They are

not on piece work over there. But as to the rest of us, I would advise you, Mr. Lee, you might want to have one of your legislative people do it, draw up a list and what you will find is, as I said, on alternate days some Members are for keeping it at the State level and the same Members the next day are for keeping it at the Federal level. I would advise you to pay absolutely no attention to any of it.

Mr. CONYERS. Pay close attention to him, but don't pay any attention to the rest of us.

Chairman HYDE. I think some people have a gift for pursuing yesterday's hearing today, which makes it interesting.

Who is next, Mr. Bryant?

Mr. BRYANT. Mr. Chairman, it is always a pleasure to have such distinguished panelists as we have today. It is always interesting to hear the argument and debate in this committee because my colleague from Massachusetts is consistent in that argument and as far as I know he follows that. He is probably the exception in this Congress and probably the exception in any Congress before this and probably the exception in any Congress after this. Very often when I speak, I use the statement he made today that we tend to want the level of government to control a problem that agrees with us. I think he said that today in other words. I think that is basically how Washington has always worked and probably works today and probably always will work that way. Whether that is hypocrisy or not, that is the way the system is. The people in control who control the votes set the agenda and rule in that fashion.

Not to say that is right or wrong, that is just the way it is.

I come to this with some trepidation in terms of nobody is for hate crimes. When you get into a system and having been a former prosecutor you work with States and you understand there are State laws out there that would cover a lot of these, perhaps the gaps, maybe there are gaps that need to be filled. I guess my question though, Mr. Lee, is in the issue of the case of *Lopez*, how do you feel about that and the chances of this bill surviving the *Lopez* decision?

Mr. LEE. We do not believe that *Lopez* has an impact on this bill. From what I can see the sponsors carefully structured it so that when we talk about (c)(1) and (c)(2), there is no *Lopez* problem. As I pointed out earlier, the basis in the Constitution for (c)(1), which is the section that eliminates the six federally protected activities, is the 13th amendment. So we are not talking commerce clause at all. We are talking 13th amendment, hate crimes as badges and incidents of slavery. With respect to (c)(2), which does have an interstate commerce effects requirement as to gender, disability, sexual orientation-based hate crimes, we are talking about a situation, and you as a former prosecutor will understand this, in which we in the Department of Justice and the United States Attorney's Office would have to prove as an element of the crime an effect on interstate commerce. That is very, that is far different from *Lopez* and takes us out of the ambit of *Lopez*.

Mr. BRYANT. In regard to the issues of gender and disability practically speaking in terms of proof, is that going to be a high hurdle to overcome, proving motivation based on gender or disability?

Mr. LEE. Well, the way we look at it is over the last 30 years, we have enforced the hate crimes statute with respect to race, religion, ethnicity and color. What we have learned from that is that it is very fact intensive. As a former prosecutor you can understand what I am talking about. We are talking about whether there are statements that indicate a class bias of some kind, and then we are talking about whether there is an absence of any other motive, such as robbery or something like that, and then we are talking about the use of epithets. I am sorry to say that the use of epithets in our cases is a big source of evidence. And then we are talking about how a crime is conducted. Sometimes that can be important evidence of motivation.

In the gender bias area, I am sorry to say this but sometimes we are talking about mutilated genitalia. We are talking about cuts on the body, things of that kind. If we have evidence of that kind, it can provide strong evidence whether it is beyond a reasonable doubt of motivation.

Mr. BRYANT. I thank you for your very good testimony.

Mr. HUTCHINSON [presiding]. The Chair recognizes the gentleman from New York.

Mr. NADLER. Thank you. Let me first make a comment to follow up some of the discussion on the question of trust of local governments and the Federal role. Let me comment that James Madison in The Federalist talked about how in local jurisdictions and local governments sometimes one faction or interest might gain control and prejudice the political and even the judicial processes in that government and that the Federal Government, which is much larger, so that one faction was much less likely to gain control, would be the protector of our liberties. That was certainly true in the 1960's in some of the southern jurisdictions where a racist faction had control of many local governments and the Federal Government had to be called in for the protection of liberties. And God knows, it may be true in the future, too. The question is not one of trust of local governments. In general, yes, we do trust local government. The question is a question of fact. Is the local government or a local society so prejudiced or acting with such prejudice against a racial group or a gay group or a lesbian group or a gender group, that in fact the wider society has to be called in. That might happen in the future. It has happened in the past.

This is not a question of do we generally trust local governments. It is that history shows, as Madison foretold, that in fact the answer has to be usually we do, but sometimes you cannot. The Federal Government is likely to be less captured by one prejudiced group than is a local government which is smaller and has fewer diverse groups within it. So on that basis the Federal Government ought to have the power to act.

Secondly, let me ask you, sir, Mr. Secretary, a question following up on the discussion with the gentleman from Pennsylvania, Mr. Gekas before, asking was it really necessary for the Federal Government to have some of this jurisdiction. I want to read you descriptions of two different crimes and tell me how this bill, if it were a statute, would affect that.

One is from your testimony, one is not. In 1994, a Federal jury in Fort Worth, Texas, acquitted three white supremacists of Fed-

eral criminal civil rights charges arising from unprovoked assaults upon African Americans, including one incident in which the defendants knocked a man unconscious as he stood near a bus stop. Some of the jurors revealed after the trial that although the assaults were clearly motivated by racial animus, there was no apparent intent to deprive the victim of the right to participate in federally protected activity. The government's proof that the defendants were not looking for African Americans to assault was insufficient to satisfy the statutory requirements of the current law 18 USC section 245.

Under this bill, how would the statutory requirements have been different so that the jury would have been able to convict?

Mr. LEE. There would be no requirement of looking to see that that man was attacked because he was at the bus stop or because he was on a sidewalk. We would be looking at what really matters. We would be looking at evidence of racial motivation. We would be looking at whether when individuals go on a crime spree and target African Americans that there is a——

Mr. NADLER. In that fact pattern, there would have been plenty of law to convict?

Mr. LEE. There would be plenty to investigate, and it is likely that given the kind of evidence that is not in that brief encapsulation was available.

Mr. NADLER. Thank you. I have one further question. I want to read one other statement of an actual case. This is a case of murder from Tennessee in 1995. January 1995, Michael Westerman, a 21-year-old white male was driving his pickup truck along the Tennessee-Kentucky border—could I have an additional 2 minutes?

Mr. HUTCHINSON. You are recognized for an additional 2 minutes.

Mr. NADLER. He had a Confederate flag mounted on the bed of his pickup truck. By all accounts he was not a member of any hate group but simply took pride in his southern heritage. A group of African Americans observed the truck and decided to kill Westerman because they were offended by the flag. Westerman was gunned down by the subjects in what was clearly a racially-motivated killing. The killing provoked considerable community unrest as well as national attention. In response to the murder a number of crosses were burned in predominantly African Americans sections of southern Kentucky, which further exacerbated racial tensions in the area. A number of groups called for Federal intervention of these incidents. Due to the statutory limitation of section 245, it appeared that the Federal Government did not have jurisdiction to prosecute the defendants who were responsible for the racially motivated murder because although the shooting was clearly racially motivated, the victim was not exercising a federally protected right at the time of the shooting. On the other hand, the Federal Government probably did have jurisdiction under other hate crimes provisions, housing interference statutes, to prosecute the cross burnings. Thus, due to the gaps in section 245 the Federal Government was in the unfortunate position of not being able to respond to the more serious precipitating incident, the murder, but was able to prosecute the retaliatory cross burnings.

Could you comment on whether you think that that observation is correct under this set of facts and whether this proposed bill would change that?

Mr. LEE. With H.R. 3081, it would be very different. The Federal Government would be able to proceed against that as a hate crime.

Mr. NADLER. So the Federal Government would be able to prosecute both the cross burnings and the precipitating murder as a hate crime?

Mr. LEE. Yes. The effect of H.R. 3081 is to make sure that prosecutors are able to make those decisions based on the best interests of the case, what the needs of the case are. If the case calls for Federal prosecution, that is what will happen. If a case calls for State prosecution, that is what will happen.

Mr. NADLER. Whereas under the present statute, you would not have that authority?

Mr. LEE. That is right. It is the best interest of the case, that is how the decisions will be made, which I think is the appropriate way these kinds of decisions ought to be made.

Mr. NADLER. Thank you.

Mr. HUTCHINSON. The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. Mr. Lee, has the Department of Justice interposed any objection at all to H.R. 3081?

Mr. LEE. The Justice Department supports it.

Mr. BARR. I am looking at the language of the bill and in particular the operative language found at the end of page 4 and the beginning of page 5, which is section 4: Because of the actual or perceived religion, gender, sexual orientation or disability of any person. Do you find that a sufficiently specific, non-vague set of terms and elements of an offense that a Federal prosecutor would feel comfortable having a high degree of success proving perceived sexual orientation, for example, when you have indicated last week in your testimony you do not know, have a definition of what sexual orientation is, nor does this particular bill, which is a criminal statute and, therefore, requires a higher burden on definitions to be proved with specificity as an element of the offense, even in the executive order that we spoke of last week?

Mr. LEE. Last week——

Mr. BARR. I will tell you as a former Federal prosecutor, looking at this, I would have a great concern about the constitutionality or the vagueness, just as one example, of that language. You do not see that as a problem at all?

Mr. LEE. I do not believe there is a problem. This is the reason why. Focusing on the term "sexual orientation," last week when you asked me about that you asked me about this in the context of an executive order that I had testified earlier that I had not had very much to do with and would not be enforcing. With respect to this legislation, the Department of Justice has carefully looked at these terms, gender, sexual orientation, disability, religion. Those are terms that Congress used in the Hate Crimes Reporting Act, the Statistics Reporting Act. They have also been used in the Sentencing Enhancement Act.

Mr. BARR. What is a perceived sexual orientation such that it would—it could be successfully prosecuted and proved beyond a reasonable doubt?

Mr. LEE. Perceived sexual orientation consistent with Federal statutory law in this is homosexuality, heterosexuality or bisexuality or the perception of it. So we have a witness who is a heterosexual gentleman. He hugged another man. He was perceived as a homosexual and he suffered grievous injury. This bill would treat that as a hate crime.

Mr. BARR. That would rise to a sufficient level of importance so that the full weight of the United States Department of Justice should properly come down on that citizen?

Mr. LEE. I have earlier testified that the importance of this bill is not only that there would be rare instances when the Federal Government would prosecute but that there would be the more typical instance in which the Federal Government would be a joint partnership with local and State law enforcement to investigate vigorously these cases.

Mr. BARR. I suspect that, I am not quite sure that this will be an equal partnership. Is sexual orientation a constitutionally protected category of activity pursuant to Supreme Court decisions? It is not. And I think that to me is one of the basic fallacies of the Department's support for this legislation. When we look at the statute that it amends, I think we find that there is a very clear basis in that statute that it is based on clearly defined categories of protected activity, for example. When you get over into sexual orientation, and I have further problems with including disability in here, for example, certain types of drug usage and drug dependency are considered by courts to be a disability.

Mr. Chairman, I would ask for 3 additional minutes.

Mr. HUTCHINSON. In fairness, we will give you 2 additional minutes.

Mr. BARR. I think there is an important reason why the statute, the original underlying statute was crafted the way that it is. I think it was designed to limit itself only to those categories of activity that are clearly appropriate, clearly defined, clearly recognized by the courts. I think there is a problem, several problems with this statute. I think it would suffer grievously from vagueness. Just the terms that I mentioned there; perceived sexual orientation, sexual orientation is not defined in the statute. I think a prosecutor might have a very difficult time proving perceived sexual orientation as an essential element of a crime. It seems to me that the Federal Government is simply taking a policy of the current administration without any basis in Supreme Court decisions, which did form the basis for the earlier statute, and couching it in language picking out some grievous cases that certainly are grievous cases. And I think that you are going to run into problems down the road if this is enacted. I do not support it, but I would urge the Department to take a little closer look at the specific language of this statute because I do not think it is well thought out. I think it would cause very serious problems for prosecutors.

Mr. HUTCHINSON. The gentleman's time has expired.

Mr. LEE. Mr. Barr, the Department has a considered judgment that those terms are appropriate. However, the Department does not have any problem with definitions or something to make things clearer. Let me talk about the general issue you raise. I am sorry, I have lost my train of thought.

What I wanted to say was, with respect to the jurisdictional, the constitutional basis of (c)(2), which I believe is what you are asking for, these crimes would require that the Federal Government include in its proof as an element of the crime, an effect on interstate commerce. That is the constitutional basis for it. So it is like the Hobbs Act, it is like the anti-racketeering, RICO statute, indeed, it is like the Church Arson Prevention Act that came out of this committee and was enacted 2 years ago.

Mr. BARR. I would say I do not see that as an element here.

Mr. HUTCHINSON. I recognize the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I want to, I guess, in a sense, not pick up on the specifics of the statute that Mr. Barr has raised but go back to a question that has been raised several times this morning about the Federalism issue and constitutionality statute. I guess I have no problem at all with where I come down on the issue of desirability of doing this, but desirability is a political judgment and a philosophical judgment and quite often a results judgment, as Mr. Frank has indicated. Constitutionality is what this committee is supposed to evaluate, and that is a legal judgment, which sometimes can be quite different than the desirability standard.

I guess the question that I am grappling with is, let us assume that this is desirable. I do assume that the statute is desirable. Is it constitutional? Will this Supreme Court say that it is constitutional? And I am probably more worried about that, the first part of the statute than I am the second part. This Supreme Court has already articulated some standards on the second part. If you are acting in interstate commerce, there are some standards there. What is your judgment about what this Court will say on the first part of this statute, whether the words slavery and involuntary servitude in the 13th amendment are broad enough to make the first part of the statute, this proposed legislation, constitutional? That is the only question I have about this.

Mr. LEE. Mr. Watt, I believe that the Supreme Court without a doubt will say that (c)(1) is constitutional; (c)(1) deals with race, color, religion, ethnicity. The statute, this is not a new statute. This is not a new idea to prohibit violence, racially-motivated violence. I have talked about the fact that we have had our present jurisdiction, 245, for 30 years. In fact, we have had, there is a longer history. The Congress that enacted the 13th amendment in 1866 was also a Congress that enacted legislation that prohibited racially based violence against the then freed slaves. That is why I believe there is an absolutely clear basis. We are not talking about anything new. We are talking about following in the footsteps of the Hate Crimes Reporting Act of 1990, the Hate Crimes Sentencing Enhancement Act, talking about the Church Arson Prevention Act, all statutes that deal in the criminal context with the prohibition of hate crimes.

Mr. WATT. Let me take this one step further though. I think we all would acknowledge that this particular Supreme Court has been taking somewhat, I perceive, to be steps back away from that and basically reading the 13th amendment in conjunction with the

14th amendment, to say that you really cannot create those dichotomies.

Mr. HUTCHINSON. The gentleman's time has expired.

Mr. WATT. I ask unanimous consent for 2 additional minutes.

Mr. HUTCHINSON. Without objection.

Mr. WATT. The presumption being that if a white person assaults a black person, the statute would be triggered. If a white person assaults a white person, the statute probably would not be triggered. Isn't this Court going to have some problems with that proposition under the 14th amendment, if you kind of extrapolate where they have been going on a lot of the affirmative action cases or voting rights cases? Is it not your perception that this Court is going to be troubled by that?

Mr. LEE. It is the considered opinion of the Department of Justice that this Court will not be. We have had *Jones* versus *Alfred H. Mayer Company* on the books for a number of years. I do not see any backing off that in terms of the 13th amendment jurisprudence. I had not seen, in recent cases, importing into the 13th amendment a State action requirement and making it more like the 14th amendment. I believe that the Supreme Court recognizes that hate crimes are different from ordinary crimes and in the *Wisconsin* versus *Mitchell* case, the opinion by the Chief Justice affirming the Wisconsin sentencing enhancement recognized that when you are talking about hate crimes, you are talking about something different from other crimes. You are talking about crimes that are more likely to result in retaliatory crimes. You are talking about crimes that are more likely to have a discrete emotional impact on the victim, and you are talking about a crime that is likely to result in community unrest.

The Court recognized in the sentencing enhancement context that that was appropriate. I believe that with respect to hate crimes, this Court has indicated a sensitivity to the law enforcement need for acting strongly against hate crimes.

Mr. WATT. Thank you, Mr. Chairman.

Mr. HUTCHINSON. The Chair recognizes itself for 5 minutes.

I want to join in thanking you for your testimony today, Mr. Lee, and seeing you back again before this committee. I think we all agree that hate crimes should be prosecuted vigorously. We all have an interest in having them prosecuted and having some Federal assistance for those that are of an extraordinarily serious nature. I know that back in the '80's in Arkansas we prosecuted hate crimes federally. We had a situation where a hate group bombed a homosexual church and burned a Jewish synagogue. We prosecuted them successfully in Federal court. But I realize there are also some gaps.

I wanted to look at some of the language of the bill and look at the provision that includes disability or the perception of disability as a basis for a hate crime. I don't remember any that you cited dealing with a hate crime against someone with a disability. But, for example, would alcoholism and drug addiction be considered a disability?

Mr. LEE. Well, I hesitate to respond to that kind of hypothetical. I think when you are talking about disability, we are going to have to look at existing Federal statutes, how they define disability.

Then you are going to have to look at whether the Federal Government is going to be able to show beyond a reasonable doubt that a particular impairment falls into that category.

Mr. HUTCHINSON. I understand that is a hypothetical. Let me make the case scenario just for your food for thought. I think that under current law, alcoholism or drug addiction could be considered a disability. So if you had a spouse who is an alcoholic and he crosses from Arkansas into Oklahoma and then comes back and the wife has had just about all she can handle and perceives that he is drunk again and assaults him.

Now, my reading of this is that if alcoholism is considered a disability, which I believe it is, then that would be subject to Federal prosecution, because you have interstate commerce, you have a disability, and you have the perception that the assault was because of the perceived disability. I think it fits within this category.

Another circumstance would be a son who has a drug addiction and comes in smoking marijuana one more time. And the father, because he perceives this, gets angry and slaps him. I know that as a Federal prosecutor that just because it qualifies as a Federal crime, you are not going to necessarily pursue that in Federal court.

My question is, I think you need to take a look at this. I am not sure there is good background or track record here for disability and whether it is too broad to be included. I hope you will reexamine that.

Secondly, I want to ask you about your guidelines. What do you anticipate as Department of Justice guidelines to more narrowly define the role of Federal prosecutors in what cases they take on, even though it might technically fit within this law?

Mr. LEE. Well, as a former prosecutor, you know in fact that we do not prosecute every crime that fits within the four corners. I think our track record on the race side and on the color and religious side, I think is an indication of what the Federal Government is going to do.

As I testified earlier, the Federal prosecutions have been not many. We have been spending a lot of our efforts assisting State prosecutions, State authorities to investigate.

With respect to the Church Arson Prevention Act, that is in some ways the best precedent, and it shows we have fostered mostly——

Mr. HUTCHINSON. Would you anticipate more restrictive guidelines than what is outlined in this bill?

Mr. LEE. There are going to be guidelines. Right now, as you know, no case is going to be prosecuted unless it is in the public interest and it is necessary to secure justice. That section, section 245 (a)(1), is going to remain the law so that certification by the Attorney General or her designee will remain. So there will be that.

In addition, we will be making very clear that when we talk about what cases ought to be investigated, much less prosecuted, that you are going to have to, in investigating this, we are going to look at not only whether there was a crime, bodily injury, and interstate commerce, we are going to look at whether there was a motive that falls within what (c)(2) requires and (c)(1) as well. That is going to—and our experience over 30 years with 245 (b)(2) is to

look at statements, contemporaneous, before-and-after statements. We are going to have to look at—and then the FBI, in addition, is going to look at whether there was another motive and where there is an absence of that motive, and where there is the use of epithets. That is very important in this area. Then we are going to look at how the crime was committed, and it is going to be a case-by-case decision. I know that will not be news to you.

Mr. HUTCHINSON. My time has expired. I want to move on to another member.

But I want to thank you again. I did not mean by asking that question to in any way trivialize the seriousness of this proposed legislation. Please understand that. I think that drafting is important, and I encourage you to look at that carefully.

With that, I would recognize the gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you, Mr. Chairman. Let me just say that I understand that disability is already dealt with, and alcoholism and drug addiction is in essence defined in existing statutes. Is that your understanding, Mr. Lee?

Mr. LEE. Yes. We have various statutes that define what constitutes a disability.

Ms. WATERS. Are you changing that? Does this bill change that in any way?

Mr. LEE. No. I am sure that we will be looking to guidance in those statutes, and we will be relying on the good sense of jurors.

Ms. WATERS. Thank you. Let me just say to you, I guess, and the members of this committee, how difficult it is to sit here and understand that in some States people of color, gays and lesbians, are covered, and in other States they are not. Understanding the strict interpretation of the Constitution of the United States, I guess that having some appreciation for that, it is still not reasonable to have human beings exposed to the kind of hatred that results in murder, loss of life and not be able to address that in a consistent manner in the United States of America.

Having said that, when you have a State such as Wyoming where there are no statutes covering hate crimes, what is the role of the Federal Government, what is the role of your office, what do you do, for example, if you have hate crimes that are not being dealt with at all? You may see something about it in the paper, hear something about it. Certainly, there are no actions in that particular State to deal with it, because it is not covered. What is the role of the Federal Government? How do you handle that and what do you do?

Mr. LEE. We are going to enforce the law and we are going to make sure that strong cases are brought. And if we can work with the State and local authorities, we will. In many jurisdictions, we can and are able to do that. In those States where State prosecutors are unable to proceed or are unwilling to proceed, and classically that would occur when they themselves do not have a statute, that would require that the Department of Justice take a leadership role in those situations. We are willing to step up to the plate because this statute does nothing more than update section 245, so it conforms with how the statute on hate crime reporting and the hate crime sentencing statutes read.

Those statutes cover disability. They cover sexual orientation, and they make it clear that those are covered concerns, Federal concerns.

Ms. WATERS. So you feel that this will strengthen your ability to deal with hate crimes in areas where you have no coverage whatsoever, no statutes, such as the State of Wyoming?

Mr. LEE. Absolutely.

Ms. WATERS. Finally, let me just say that as I understand this bill, still for gays and lesbians there must be the interstate commerce nexus here, that that is still something that you cannot simply disregard in pursuit of hate crimes against gays and lesbians?

Mr. LEE. Yes, we have the interstate commerce effect requirement as an element of our proof on hate crimes under this bill with respect to disabilities, sexual orientation and gender.

Ms. WATERS. Thank you very much, Mr. Lee.

Mr. HUTCHINSON. I thank the gentlewoman. The Chair now recognizes the gentleman from California, Mr. Rogan.

Mr. ROGAN. Thank you, Mr. Chairman. I also join my colleagues in thanking and welcoming the Acting Assistant Attorney General for joining us today and for his testimony. First, Mr. Lee, let me say at the outset that I am not expressing any judgment as to the merits or demerits of this legislation. I think hearings like this are helpful for freshman members such as myself, and particularly new members of the committee.

I note that some of the concerns expressed by the Administrative Office of the United States Courts in a letter to Chairman Hyde, wherein they indicate this legislation does present a significant issue of Federalism which is of concern to the Federal judiciary, has my attention.

I wanted to go over a couple things with you for my own clarification from both your oral and written testimony. If a couple of these questions seem elementary, I hope you will forgive me, having never been a Federal prosecutor myself.

First, you noted in your written testimony the bill's commerce clause element, which requires proof of a nexus to interstate commerce in cases involving conduct in the newly protected categories that are proposed in H.R. 3081. I am just wondering, parenthetically, if a State has, for instance, a murder, a rape, an assault with a deadly weapons case that does involve a nexus to interstate commerce but does not come within any of either the federally protected activities or the characteristics as set forth in 3081, does the Department of Justice have jurisdiction to step in and prosecute those as Federal offenses?

Mr. LEE. At this point in time, if we do not have jurisdiction under (b)(2), we cannot step in.

Mr. ROGAN. You cannot step in under the hate crimes statute. What about under other Federal statutes dealing with murder, rape, assault and so forth?

Mr. LEE. We do not have Federal statutes dealing with murder and rape. Usually those are usually Federal—pardon me, State offenses governed by State law.

Mr. ROGAN. You do have limited jurisdiction under some circumstances?

Mr. LEE. That is true. If it occurs on a Federal Air Force base for instance, things of that kind.

Mr. ROGAN. But the interstate commerce clause would not give you jurisdiction on any of those type of offenses?

Mr. LEE. We do not have (c)(2) yet. If we had—no, we do not have that yet.

Mr. ROGAN. Thank you. Now, if Federal jurisdiction is expanded as the Department is suggesting, you stated in your testimony that you are confident that the overwhelming majority of hate crimes prosecutions would continue to be brought in State court under State law. I also noted with interest the limited number of examples that the Department of Justice has stepped in. A couple of the other examples you set forward in your testimony dealt with various cities where the Department of Justice apparently felt that an inappropriate result was achieved. You had a number of examples listed where Federal hate crimes statutes were inapplicable because the facts of each case did not fit the limitations of current law.

In those examples, such as the Detroit example or the Fort Wayne example, was there anything that precluded State prosecutions for either the murder that occurred in Detroit or the attempted murder that occurred in Fort Wayne?

Mr. LEE. Well, I have in my mind the Detroit example, I think, which involved Vincent Chin. In that case, the State had declined to prosecute it. In those examples, some of them were examples in which States had declined to prosecute and some were cases in which the States could move forward.

Mr. ROGAN. Do you know why the State declined to prosecute the murder charge?

Mr. LEE. I do not know in that situation.

Mr. ROGAN. I am assuming that there are a number of times when prosecutors have allegations before them where they have to work with the police and check out the facts and make a determination if the facts fit the law. And if not, you would agree with me that sometimes no prosecution is an appropriate response?

Mr. LEE. Yes.

Mr. ROGAN. So you are not saying that there was anything particular about those cases that demonstrated any racism or bias on the part of prosecutors or any law enforcement officials in those particular cities?

Mr. HUTCHINSON. Does the gentleman seek additional time?

Mr. ROGAN. Two additional minutes, if I may.

Mr. HUTCHINSON. Without objection.

Mr. LEE. My experience is that when you are dealing with local law enforcement and local prosecutors, the vast majority of those people are acting in good will. There are no problems of bias. Sometimes that happens, and I hope that it is very rare nowadays. What I have encountered is not so much that kind of problem. The problem is that the average District Attorney's office has seven employees and when a hate crime of a particularly horrendous nature hits in a particular jurisdiction, they need help sometimes. The Federal Government, if we have this coverage, will be able to help.

Mr. ROGAN. Is there anything that currently precludes the Department of Justice or the Federal Government from stepping in and assisting local jurisdictions?

Mr. LEE. Yes, we have to have a Federal crime that is indicated for coverage purposes. We just cannot step into any particular——

Mr. ROGAN. You cannot step in uninvited, but for instance, if there was a heinous State crime that occurred in a particular jurisdiction where the local officials did not feel they had the appropriate resources, are they free, for instance, to contact the FBI or the Department of Justice and request assistance?

Mr. LEE. They do, and the FBI often is able to respond. The situation that I was trying to talk about is not that response situation but a partnership in which you jointly investigate. Often that is what contributes to working these cases up and making for an effective prosecution.

Mr. CONYERS. Would the gentleman from California yield for just a moment?

Mr. ROGAN. I suspect just a moment is probably all I have left.

Mr. HUTCHINSON. The gentleman's time has expired.

Mr. CONYERS. I ask unanimous consent for 1 additional minute.

I want to thank you for raising the Vincent Chin case because in that case we are talking about the Wayne County prosecutor who has over 100 lawyers. We are talking about people of supposed goodwill, Mr. Lee. The problem was, it was political. It was not racial. The case was not declined there, but it was about the automobile industry. And they were thinking—this was a Japanese American and they were thinking about exports and imports. And the case did not get picked up for what I suspect is political reasons. I thank you for raising that kind of incident which frequently occurs where the people are not racist at all. They just do not want to deal with a hot potato.

Mr. ROGAN. I thank the gentleman for his comments. I also thank the chairman and the committee for giving me the additional time.

Mr. HUTCHINSON. The Chair now recognizes Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank the chairman for his kindness and again to thank Chairman Hyde for this hearing, along with Ranking Member Conyers. I, too, want to raise a number of questions, but before I do that, let me say to you, Mr. Lee, we thank you for your commitment and the vigorous posture that you have taken in spite of the procedural position that you are in, for many of those who may be hearing this need to understand that those in the other body did not see fit for a variety of reasons, of which I vigorously disagree, to complete your confirmation. You have been a spark of balance and fairness, and I think it is appropriate to say in the Record that one of your proponents, who happened to have been an advocate, a Republican in the other body, has said in public that, I think it was a mistake, this is a quote from a Senator, to block, a Republican Senator, your confirmation, and that I think he is doing a terrific job. I thought he was well qualified.

I think that is important because hindsight sometimes is the best sight.

Also I respect my colleagues who have mentioned in their discussions this whole issue of States rights. Might I ask us to go on a

chronological revisiting of prior history, and that was the time that we were engaging, in the writing of the 1964 Civil Rights Act and the 1965 Civil Rights Act, in fact, there were representatives from Texas who happened to be one or two of the few who voted for those laws out of commitment and loyalty to Lyndon Baines Johnson. But the arguments against were the same.

Do we not think the States can do the job and have they not done the job, or is it not a question of States rights? I would venture to say that what we have here is the same context and that if we were not in this hearing and we were out and about amongst Americans and we were to share with them that you could only come in to these actions of issue of race, color, religion, certainly not sexual orientation as the law is not written, if you were involved in six federally protected activities, of which most of us cannot recite and most Americans would find ludicrous and outrageous. I think that as you travel to Houston, I look forward to having you speak to regular citizens who will tell you face to face how they feel about this incident. I would hope that we would have that opportunity.

I would like to take this in a slightly different direction, because I complimented the chairman and ranking member for this hearing, but I also said that this is the first time that we have been proactive on the issue of civil rights, which you have a responsibility overall, as the chief officer. I understand that we are having difficulty in full funding of civil rights enforcement. I understand that there has been a substantial increase in hate crimes, although we realize that basically hate crimes are being underreported. In fact, we had a hard time getting individuals here because of the fear and intimidation.

Frankly, on a personal note, I am sick and tired of going to funerals. I went to Frank Mangioni's funeral, a gay person in Houston who was stabbed 35 times at a bar by people who traveled to Houston, I guess to kill someone gay.

Unfortunately, we operate out of fear and out of hysteria. We have a backlog in employment discrimination cases. The 30th anniversary of the Fair Housing Act, we still have people who are discriminated against. If you would—and unfortunately, in Houston, when we were so proud, we have someone who has articulated the fact that proposition A that was against affirmative action, the citizens voted to keep affirmative action and someone, some judge has said that the citizens' voices are mute.

So we, I think, are in a civil rights crisis. And I ask the chairman for an additional 2 minutes.

Mr. HUTCHINSON. Without objection.

Ms. JACKSON LEE. I ask the question, if you would, number one, help me understand how you can possibly—I appreciate where we are in this issue of disability and gay and lesbian addition to these new hate crimes. Are we going to be overburdened? I respect our prosecutors. I have not seen the hysteria of massive prosecuting of cases of drugs and marijuana taking people that says that we would abuse it. By the way, Mr. Chairman, I would like to submit into the Record the FBI guidelines that already exist on the issue of disability and other issues, if you would.

Mr. HUTCHINSON. Without objection.

Ms. JACKSON LEE. Is that going to be burdensome to attach the commerce clause? That is my first question. Would it be helpful for us to hold a hearing on ENDA, the Employment Nondiscrimination Act, would that be an additional asset for you in helping to decrease discrimination against individuals? And lastly, how can we assist you in giving you added resources for civil rights enforcement such as the Community Relations Service that has done such a great job in Jasper, Texas, that is underfunded. And on behalf of Jasper, Texas, let me thank you for collaborating with them. If you would answer those three questions, I would appreciate it.

Mr. LEE. With respect to the Community Relations Service, that is a small part of the Department of Justice in which Congress more than gets a bang for its buck. And it is regrettable that its good work has been cut back year after year. I think what happened in Jasper shows a need for sensitive law enforcement oriented community relations and helping local communities do the right thing. I think that when Mr. Byrd was killed, many feared what might happen in Jasper but the citizens and the leaders in that community pulled together, and I think the whole country should be proud of them.

I think the CRS has played an important role in that. I hope that this committee will commend CRS and make sure that it gets adequate funding.

With respect to enforcement of 3081, the President has committed to 40 additional FBI agents and lawyers for U.S. Attorney's offices to make sure that there are additional resources. I have pointed out that we do not expect to do very many additional prosecutions. We need the resources to make sure that we have enough.

Mr. HUTCHINSON. Mr. Lee, time has expired. I don't want to cut you off but——

Mr. LEE. With respect to ENDA, I believe we are here on a very important bill dealing with hate crimes. This is not an issue that is, in my opinion, partisan in any way. With respect to ENDA, I believe that it is useful, it would be useful for this committee to consider that statute. The Employment Nondiscrimination Act, I think, does important work in the area of employment discrimination. That is as much as I think I should say about it, because I do not want to detract from the importance of hate crimes and the need for this committee to act on this bill.

Mr. HUTCHINSON. The Chair recognizes the gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. I am going to, I think this is a quote from Mr. Holder. I think it goes to much of what we have heard that is implicit in the questions that have been posed by other members of the committee. It is my understanding that Mr. Holder stated that Federal jurisdiction, I am quoting now, is needed only to permit joint investigations with local prosecutors and when local prosecutors are either unable or unwilling to pursue the case would this particular act be triggered.

Is that a fair statement?

Mr. LEE. That is a fair statement.

Mr. DELAHUNT. I think it is important to really put out there and be very clear that this is not an attack on Federalism.

Mr. LEE. No, we are talking about concurrent State and Federal jurisdiction.

Mr. DELAHUNT. This will do nothing in terms of preempting the States, civil rights acts.

Mr. LEE. Absolutely.

Mr. DELAHUNT. And it is a fair statement to say that there is great disparity between various jurisdictions at the State level in terms of the civil rights statutes as well as the capacity to enforce;

Mr. LEE. Absolutely.

Mr. DELAHUNT. You agree with that.

Mr. LEE. Yes.

Mr. DELAHUNT. I think it is important to understand that what we are suggesting here is that with the passage of this act, the Federal Government will be in a position to supplement gaps in enforcement and resources at the State level.

Mr. LEE. Yes. From the perspective of law enforcement, this is going to fill gaps. This is going to make sure that we do a much better job of prosecuting hate crimes.

Mr. DELAHUNT. And there is no impediment if this act should pass in terms of providing those resources; if requested by State or local governments, this removes any impediment that may exist at this point in time?

Mr. LEE. That is correct. That is a very important point.

Mr. DELAHUNT. All right. And in terms of judicial economy, and my friend and colleague from Massachusetts, Mr. Frank, talked about class action suits because yesterday we were in the midst of a markup where some of us have divergent opinions upon the burden that that particular act might place on the Federal courts, but what you stated here this morning is that most prosecutions would continue to be handled at the State level, at the local level?

Mr. LEE. Most prosecutions will continue to be handled at the State level. The Federal Government will be able to back stop much more effectively.

Mr. DELAHUNT. Exactly. And historically in terms of civil rights enforcement, there have been few turf and jurisdictional battles among Federal, State and local when it comes to hate crimes.

Mr. LEE. That is correct, and we have excellent relationships with the Attorneys General and with the National District Attorneys Association, and we look forward to working with them.

Mr. DELAHUNT. I was going to conclude with that because I do not want to extend your time here, but I know that Mr. Devine, who I think is a Vice President of the National District Attorneys Association, will be testifying in the next panel together with the National Association of Attorneys General, and I would hope and recommend and I would wonder if you have already considered sitting down with these various law enforcement associations to work out an appropriate protocol so that there are no jurisdictional problems.

Mr. LEE. I am so glad you raised that because we have already sat down with the National Association of District Attorneys to work out an understanding of how to deal with hate crimes to make sure that there will be cooperation, coordination and not have any fussing over particular cases. The object is to bring better cases. It does not matter——

Mr. DELAHUNT. Let me make a statement that as a former State prosecutor, one who represented in excess of 1 million people with a very large office, our experience has been exactly as you relate, Mr. Lee, in terms of dealing with these particular issues, because in the vast majority of cases, there is a confluence of interest and it is not about who gets the credit but about making the best case. I am happy to be a cosponsor of this legislation, and I know that Mr. Devine will speak about his support for it because, honestly, collaboration and cooperation among the various jurisdictions is important because in these kinds of situations not only is justice done but it really establishes a clear national priority.

Mr. HUTCHINSON. Your time has expired.

Mr. DELAHUNT. May I have an additional minute?

Mr. HUTCHINSON. You may.

Mr. DELAHUNT. In terms of the CRS, it is a great investment for the taxpayer. I have worked hand in hand with Marty Walsh up in the Boston office. Many incidents and situations were defused. It took a proactive approach to dealing with issues of potential hate crimes and problems that could have festered. I would urge you to continue to advocate on behalf of CRS. It is an invaluable tool and in the end saves the taxpayers a lot of money.

Mr. LEE. I agree with all of what you said. I hasten to say that some of the best friends of CRS are local law enforcement and they are the ones who know the work, the good work that is done.

Mr. HUTCHINSON. Thank you, Mr. Lee, for your testimony. You have been at it for right at 2 hours today. We appreciate your strong constitution as well as your cooperation.

At this time this panel will be dismissed and we will continue with the second panel. Our second panel consists of six witnesses who will give us a variety of perspectives on the issue we are dealing with today. Our first witness is Professor Cass Sunstein, a graduate of Harvard College at Harvard Law School. After graduation, he clerked for Justice Benjamin Kaplan of the Massachusetts Supreme Judicial Court and Justice Thurgood Marshall of the United States Supreme Court. Before joining the faculty of the University of Chicago Law School, he worked as an advisor attorney in the Office of Legal Counsel of the United States Department of Justice. His principal research interests include administrative law, environmental law, welfare law and constitutional law.

Our next witness is Professor John C. Harrison, a graduate of the University of Virginia and Yale University Law School. He is presently a professor at the University of Virginia Law School. Mr. Harrison teaches administrative law, constitutional law, and Federal courts. He joined the faculty in 1993, after working at the United States Department of Justice, where he was a Deputy Assistant Attorney General in the Department's Office of Legal Counsel. He served as a law clerk for Judge Robert H. Bork of the United States Court of Appeals for the D. C. Circuit.

Next we have Marc Bangerter, a victim of a brutal attack on April 15, 1998, in Boise, Idaho. Mr. Bangerter suffered multiple injuries that left him with no light perception in his left eye. We appreciate his courage in coming here today to testify.

Our next witness is Richard Devine, the Cook County State Attorney in Chicago, Illinois. Mr. Devine is a graduate of Loyola Uni-

versity and Northwestern University School of Law. In 1980, he joined the Cook County State Attorney's Office as first assistant to States Attorney Richard M. Daley. He has authored the Cook County Manual, Hate Crime: A Prosecutor's Guide.

Next we have professor Jack McDevitt, the Codirector of the Center for Criminal Justice Policy Research, who is also an assistant professor at the College of Criminal Justice at Northeastern University in Boston, Massachusetts. Mr. McDevitt is a graduate from Northeastern University, where he received his Master's Degree of Public Administration. His field of interests include deviant behavior and social control, public policy and performance, research methodology and statistics and organizational theory and dynamics. He is the coauthor of the book, Hate Crimes: The Rising Tides of Bigotry and Bloodshed. Moreover, he is the principal author of Hate Crimes in 1990: A Resource Book.

Our final witness is Kimberly Potter. She is a senior research fellow at the Center for Research in Crime and Justice at New York University School of Law. Ms. Potter is a graduate of Rutgers University and New York University School of Law. She is the coauthor with James B. Jacobs of Hate Crime: Law and Identity Politics.

Welcome, members of the panel. Your written statements will be made a part of the record in their entirety. We request that you limit your oral testimony to 5 minutes or less.

With that introduction, we welcome all of you, and we will begin the panelists, as I introduced them, with Mr. Sunstein.

STATEMENT OF CASS R. SUNSTEIN, LAW PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, IL

Mr. SUNSTEIN. Thank you very much, Mr. Chairman. I will be discussing the constitutional issues raised by this bill and I will not deal with issues of policy.

My conclusion in brief is that this bill is well within Congress's authority under the Constitution, in particular under the commerce clause of article I. Under the Court's commerce clause cases, the basic issue is whether Congress has a rational basis for concluding that the activity that it seeks to regulate substantially affects interstate commerce. That rational basis test has stood after the *Lopez* decision, which was referred to this morning.

Section (c)(2) of the bill, which adds in protected categories disability, sexual orientation and gender, has a jurisdictional requirement. It has to be shown that there is a connection between these hate crimes and interstate commerce. Because there is a specific jurisdictional requirement in the bill, it is almost certainly constitutional on its face. There are lots of Supreme Court cases and bunches of lower court cases so concluding.

I do not believe there is much of a question about section (c)(2). Section (c)(1) doesn't have a jurisdictional requirement. Section (c)(1) involves race, color, religion or national origin hate crimes. And here, under the commerce clause, the question is whether Congress has a rational basis to conclude that these kinds of hate crimes substantially affect interstate commerce.

The basic argument is pretty simple and straightforward. It is that people are deterred from traveling to areas in which hate

crimes occur. Fear is widespread in the wake of a hate crime. Hate crimes on these enumerated bases are well known to people who would otherwise engage in interstate travel or interstate commerce, and the claim would be that Congress has a rational basis for concluding there is an effect on interstate commerce. That argument is analogous to ones that have been accepted by the Supreme Court in the not terribly distant past and by lower courts in the very recent past.

The principal obstacle to this line of argument is the *Lopez* case, involving guns near schools, where the Court emphasized that the mere fact that violence is involved does not authorize Congress to invoke its commerce power. This bill is very different from the bill involved in the *Lopez* case in two different respects.

First, this bill, unlike the bill in *Lopez*, involves detailed congressional findings of effects on interstate commerce. The Court emphasized in the *Lopez* case that there were no such findings in the Gun Free Zone Act involved in the *Lopez* decision.

In addition, the *Lopez* case involved education, which two crucial votes in the *Lopez* case indicated is a traditional local activity on which the Federal Government may not intrude without very, very careful evidence of effects on interstate commerce. Here education is not involved.

Not only are there findings, there is a rational basis for the findings as reflected in evidence before this committee and the Senate committee. I would add only that the *Lopez* decision was a sharply divided court. The Supreme Court has shown no interest in the last couple of years in extending the *Lopez* case, and the lower courts have been remarkably uniform in reading *Lopez* narrowly so as not to invalidate exercises of congressional authority. The lower courts have read *Lopez* narrowly, even in cases involving a weaker claim for congressional authority than here, such as the Violence Against Women Act and the Freedom of Access to Clinics Act, both of which have been upheld in the overwhelming majority of cases.

The Civil War amendments also provide a plausible though less solid basis for this act. The 13th amendment can be legitimately invoked insofar as section (c)(1) of the bill involves racial hate crimes. It is trickier with respect to other kinds of hate crimes. Here the 14th amendment is a plausible source of authority, especially if Congress could find that State and local governments have denied equal protection of the laws to people who have been subjected to hate crimes at the State and local level.

With a finding of that sort, it would be plausible to invoke the 14th amendment as well. There is authority in lower court cases and Supreme Court cases for using the 13th and 14th amendments here. It is more fragile than the commerce clause, which is the most forceful basis for this bill.

One brief note on the Federal structure: This bill is in line very much with post Civil War practice which has involved the protection at the national level of victimized groups from crimes that State and local authorities have not prevented. It serves a deterrent and symbolic function that is not inconsistent with previous practice.

My conclusion is very brief. This bill would be well within congressional authority under the commerce clause, and it is consistent with Federal-State relationships since the Civil War.

[The prepared statement of Mr. Sunstein follows:]

PREPARED STATEMENT OF CASS R. SUNSTEIN, LAW PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, IL

I am grateful for the opportunity to appear before you today to discuss some of the legal issues raised by H.R. 3081, the Hate Crimes Prevention Act of 1997. I restrict myself to issues of law, and do not discuss issues of policy. In brief, I believe that the bill would be constitutional on its face. The stronger ground for constitutionality stems from the commerce clause.

The bill would change existing law by adding two provisions. Section 4(c)(1) would make it a federal crime to commit certain crimes of violence against any person because of that person's race, color, religion, or national origin. Section 4(c)(2) would make it a federal crime to commit certain crimes of violence because of the religion, gender, sexual orientation, or disability of that person. Unlike the first, this second provision has a special condition, 4(c)(2)(B), saying that there must be some nexus with interstate commerce. Neither provision requires that the defendant act under color of state law.

There are two possible sources of federal power here: the commerce clause and section 5 of the fourteenth amendment.[1] I deal with each in turn.

COMMERCE CLAUSE

The first—and most secure—possibility is that the commerce clause could be used, with appropriate findings, to support this assertion of national power. It is obvious that private violence may well interfere with interstate movement of both people and goods. The current findings are quite good in this regard. To make this argument as secure as possible, it would be desirable for Congress to compile factual evidence of an effect of this sort. Cf. Heart of Atlanta Motel v. US, 379 US 241 (1961), Perez v. US, 402 US 146 (1971).

Section 4(c)(2)(B) contains a jurisdictional requirement, and thus section 4(c)(2) seems to raise no serious constitutional question. More generally, and in defense of section 4(c)(1), the strongest argument on behalf of the bill would take the following form. Private violence on each of these particular grounds discourages people from moving from one state to another. It is well known by members of certain groups that there is a good deal of violence against them in certain states, and this significantly affects the interstate movement of goods, persons. and services. If there is gender-related violence in New York, for example, people are less likely to travel to New York; if it is known that hate crimes occur in Texas on the basis of race, African-Americans will be less likely to go to Texas; if it is known that homosexuals are subject to a high degree of violence in Nebraska, interstate movement will be adversely affected. The deterrent effect of hate crimes is especially likely in light of the fact that such crimes tend to be highly publicized and hence salient to individual citizens. Moreover, those who commit the relevant acts of violence sometimes travel across state lines in order to do so, and often they use instruments (guns, for example) that have traveled in interstate commerce. These arguments have the same form as many arguments that the Court has accepted in the past. See Heart of Atlanta, supra; Perez, supra.

The best counterargument would be based on United States v. Lopez, 514 U.S. 549 (1995). There the Court held that Congress could not prevent the possession of guns within 1000 feet of schools, even though the legislation was defended as a means of promoting safety and in that sense promoting the free flow of goods. Lopez might be used to suggest that this bill is really regulating intrastate activity; it might be said that the "nexus" with interstate commerce is too abstract and speculative—just as in Lopez itself, where the Court said that the mere prospect that interstate travel might be deterred by gun ownership was not enough to establish na-

[1] I do not deal with thirteenth amendment issues. It is conceivable that the ban on private acts of violence could be justified on thirteenth amendment grounds insofar as those acts are based on race, and adventurous commentators have suggested a more expansive reading of the thirteenth amendment. See Note, A Thirteenth Amendment Defense of the Violence Against Women Act, 146 U. Pa. L. Rev. 1097 (1998). On conventional assumptions, however, the thirteenth amendment is at best usable only for those aspects of H.R. 3081 that deal with racially motivated violence.

tional power, at least not without a clear factual record or without a jurisdictional requirement of some kind.

The Lopez Court in particular emphasized that Congress may regulate "those activities having a substantial relation to interstate commerce"; this test requires that the regulated activity "substantially affects" such commerce. The basic problems in Lopez were that economic activity was not involved; there was no jurisdictional element ensuring, "through case-by-case inquiry," that the possession of the firearm in question affects interstate commerce; and findings of substantial effects on interstate commerce were lacking in the legislation.

On this view, "violence" cannot by itself be enough to invoke the commerce power. If it could, there would be no limits on Congress' authority to establish national criminal law, at least insofar as crimes of violence are concerned. The lesson of Lopez is that there are such limits and that references to violent crime are not enough to justify federal authority. This was essentially the Court's basic claim in rejecting the government's contention.

It is unlikely, however, that Lopez would be used to strike down the bill. The first point here is that Lopez was decided by a sharply divided Court, by a bare margin of 5-4—and also that Lopez was the only case striking down an assertion of national power under the commerce clause in six decades. Indeed, Justice Kennedy, joined by Justice O'Connor, wrote a separate concurring opinion, suggested a quite narrow understanding of the outcome. Justice Kennedy emphasized that there are "over 100,000 elementary and secondary schools in the United States," and he suggested the importance of the fact that the statute "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." It is clear that Justice Kennedy thought it crucial that the statute at issue regulated education, a traditionally local prerogative.

It is also noteworthy that lower courts have shown a distinctive reluctance to extend Lopez, and that the clear trend in the courts of appeals and the district courts is toward an exceptionally narrow reading. For example, lower courts have upheld the Child Support Recovery Act, see, e.g., US v. Hampshire, 95 F.3d 999 (10th Cir. 1996); the Anti-Car Theft Act, see, e.g., US v. Hicks, 103 F.3d 28 (3d Cir, 1997); the Freedom of Access to Clinic Entrances Act, US v. Wilson, 73 F.3d 675 (7th Cir. 1995); and the Violence Against Women Act, see, e.g., Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949 (4th Cir. 1997). Several of these statutes—most notably those involving clinic entrances and violence against women—have been challenged on grounds similar to, and very possibly stronger than, the grounds invoked to challenge this bill. The fact that the lower courts have been so unreceptive to these similar challenges is strong evidence that H.R. 3081 would be upheld.

In the lower courts, the basic idea—drawing on the Supreme Court's own commerce clause decisions—is that a national statute should be upheld if there is a rational basis for believing that the underlying activity substantially affects interstate commerce, and if the law in question is reasonably adapted to Congress' goal. Here there is a rational basis for that conclusion, and there is no doubt that the bill is reasonably adapted to its goal.

More particularly, *Lopez* might be distinguished in several ways. First, the bill contains far better findings connecting the relevant violence to commerce. Part of the concern of the Lopez Court was that Congress had made hardly any effort to show how the relevant legislation actually involved commerce. There was little deliberation on this question; the relevant bill seemed to use commerce as a pretext. Here, by contrast, there are careful and entirely plausible findings. (For this bill, greater evidence of the relationship between the relevant violence and interstate movement of persons and goods could be extremely important in showing that this issue is different. Examples in which people, perhaps including commercial actors, are deterred from moving to certain areas would be very useful. Statistical evidence would also be helpful.)

Second, this statute would not deal with education, something that is traditionally within state control. As noted, this point was important to Justices Kennedy and O'Connor, crucial votes in Lopez, who suggested that the Lopez legislation was interfering with a zone left by conventional practice to the states, See id. (Kennedy, J., concurring). By contrast, no traditional state function is involved here. On the contrary, the protection of disadvantaged groups from private violence is a function that the nation has, since the Civil War, exercised on many occasions.

Third, section (c)(2)(B) explicitly requires a connection with interstate commerce. This should be sufficient to insulate this part of the bill against a facial challenge to its constitutionality. Section (c)(1) would be more secure if it also included this component. But the lower court cases suggest that this is not necessary in the presence of sufficient findings, and the fourteenth amendment may also be sufficient for this subsection, a point to which I now turn.

FOURTEENTH AMENDMENT

Section 5 of the fourteenth amendment allows the federal government to enforce the provisions of that amendment. By its own force, the fourteenth amendment applies only to public officials and not to private actors. But there are nonetheless two possible arguments on behalf of the legislation.

1. The Court has not finally resolved the question whether Congress can reach purely private conduct pursuant to its section 5 authority. See United States v. Guest, 383 US 745 (1966), It is possible to argue that Congress does have this power. Private violence was a large problem inspiring the fourteenth amendment and the whole idea of "equal protection" was largely designed to ensure that blacks would be protected equally with whites against private as well as public depredations. In this light it is possible that Congress could use section 5 to reach private violence even if the fourteenth amendment does not do so by its own force.

I think that this argument has a good deal of weight as an original matter, cf. Akhil Amar, The Bill of Rights (1998), but I am not at all certain that the current Court would accept it. It is clear that the fourteenth amendment does not by its own force apply to private action, and the Court has given recent signs of reluctance to allow Congress to go much beyond what the fourteenth amendment, on its own, requires. See especially City of Boerne v. Flores, 117 S.Ct 2157 (1997), striking down the Religious Freedom Restoration Act as beyond Congress' power to "enforce" the fourteenth amendment. Here the Court indicated that section 5 is remedial, not substantive; an effort by Congress to reach purely private conduct would—on the argument offered thus far—appear to be substantive, rather than remedial, and hence prohibited by City of Boerne.

2. Perhaps Congress could defend this legislation not on the ground that it is reaching private conduct, and not on substantive grounds at all, but explicitly as a *remedy* for demonstrated problems in state law and more particularly in state legal systems, which, Congress might find, are not providing adequate, or equal, protection against these kinds of crimes, Hence the federal legislation could be found necessary to provide " equal protection" against special forms of private violence. On this view, Congress is using its power under section 5 to ensure that people receive equal public protection against the relevant crimes. This could be styled as an expressly remedial exercise of power.

This argument seems to have been invited both by City of Boerne, supra, and more clearly by The Civil Rights Cases, 109 US 3 (1883), in which the Court observes that the relevant legislation "does not profess to be corrective of any constitutional wrong committed by the states . . . [It] applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of that amendment." With this line of argument, it might be said that Congress has found that there is now inadequate state protection against crimes of violence of this sort and that national legislation is necessary to counteract a denial of equal protection of the laws in state criminal justice systems, which (it might be found) discriminate unconstitutionally in providing protection against private violence.

The bill should be very explicit about this, and it would be desirable to make a strong evidentiary showing. I might note that the Violence Against Women Act, which received support from many diverse members of Congress, was justified partly by an argument of this kind. The argument for this bill would in a sense be stronger insofar as racially motivated violence is its central target. Finding (10) of the bill might be rewritten by adding, "Many states provide discriminatory and inadequate protection against private violence on the basis of [list the bases] and thus fail to provide equal protection of the laws for their citizens."

It must be added, however, that this is a somewhat speculative argument, one that will run into some issues under City of Boerne, supra, because there is no case that expressly upholds an act of this kind, and it is not clear that Congress could find unconstitutional discrimination of this kind in state criminal justice systems. The argument does appear stronger than that in 1 above, however.

3. If one of the foregoing lines of argument is accepted, H.R. 3081 is probably constitutional insofar as it makes it a federal crime to engage in private violence because of race or color. Harder questions are raised by private violence because of national origin, religion, gender, sexual orientation, or disability. The reason for this concern is that race and color are the "core" concerns of the fourteenth amendment. Of the other categories, Congress is on most secure ground with respect to national origin, religion, and gender (as to which the Court has held that discrimination is subject to strict or intermediate scrutiny), and least secure ground with respect to

sexual orientation and disability (as to which the Court applies a form of "rational basis" review).

The Court has not of course held that discrimination on the basis of sexual orientation or disability is "suspect" under the equal protection clause, and hence the Court has not said that the fourteenth amendment provides special protection to homosexuals or disabled people. See Romer v. Evans, 517 US 630 (1996); Cleburne v. Cleburne Living Center, 473 US 432 (1985). Thus it is not clear that the Court would allow Congress to provide special safeguards against this kind of private violence, which did not of course, help inspire the fourteenth amendment, and which the Court has not treated as analogous to racially motivated violence.

A possible argument on behalf of adding violence motivated by sexual orientation or disability would rest on a broad reading of Katzenbach v. Morgan, 383 US 641 (1966), which seems to allow Congress some authority not merely to enforce but also to define constitutional rights. Perhaps Congress could conclude that private violence against homosexuals and the disabled raises distinctive fourteenth amendment concerns even if the Court itself would not reach this conclusion. In principle, this might well be an acceptable exercise of congressional authority; but there is no assurance that the Court would agree, and considerable evidence points in the other direction. See City of Boerne, supra.

It is also possible to say that the states' failure to provide adequate protection against violence directed at homosexuals and disabled people has been "irrational" under the equal protection clause, and that the failure of states adequately to police such violence is, in Congress's view, a reflection of "animus" and hence irrational under prevailing constitutional standards. See Romer v. Evans, 116 S. Ct. 1620 (1996); Cleburne v. Cleburne Living Center, 413 US 432 (1985). This argument would have the advantage of making it unnecessary to say that discrimination against homosexuals is similar to discrimination against blacks. Here too a factual record would be he1pful.

With respect to the fourteenth amendment, my general conclusions are as follows. First, there is a plausible argument that Congress can reach private conduct under the fourteenth amendment, but the current Supreme Court is not likely to accept this argument. Second, there is a plausible argument that Congress can reach private conduct on the particular theory that states are denying some of their citizens equal protection of the laws, by failing to provide acceptable (oe equal) protection against hate crimes; but this argument should depend on explicit findings and a good factual record. Third, if one of these arguments is accepted, there is a good argument that the bill is constitutional insofar as it reaches violence because of race and color; a pretty good argument that it is constitutional insofar as it reaches violence because of national origin, sex, and religion; and a weaker argument that it is constitutional insofar as it reaches violence because of sexual orientation and disability.

A BRIEF NOTE ON THE FEDERAL STRUCTURE

I have been dealing here with legal questions, and not at all questions of policy; but there is one issue that touches on an uncertain borderline between the two. Some critics have said that a bill of this kind is inconsistent with the federal structure, first because the crimes in question are dealt with by state law (which at a minimum treats "hate crimes" as "crimes" of some kind, e.g., ordinary murder and assault), and second because there is no demonstrated need for national action (partly because states can and often have created "hate crimes" on their own).

On certain factual assumptions, these concerns are not entirely without force. But there are important countervailing considerations. Because of the unusual national effects of such crimes, crimes of this kind require, and deserve, special deterrence and also they reflect a distinct form of wrongdoing on the part of the perpetrator. From the standpoint of the national structure, there is a large difference between an ordinary assault and an assault undertaken because of the victim's race or religion. The latter kind of assault triggers genuinely national concerns, as the rise of legislation from the Civil War has suggested. (Recall that insufficient deterrence of private violence against former slaves was a primary impetus for the equal protection clause.) From the standpoint of the constitutional structure, it is entirely legitimate for the national government to offer special assurance to people that they will not be subject to hate-related crimes.

There is a further point. The criminal law has deterrent functions, to be sure, but it also has "expressive" or symbolic functions, assuring people that they are worthy of equal concern and respect, and that Congress itself intends to ensure that they are not subject to the risk of criminal violence because of certain characteristics. In the face and aftermath of well-publicized hate crimes, it is legitimate—in light of

both the fourteenth amendment and the commerce clause—for Congress to take special steps to prevent further such crimes and to provide the relevant assurance.

GENERAL QUESTIONS AND COMMENTS

I do have a few questions and comments about the bill in its current form.

1. It is not clear why religion appears in both (c)(1) and (c)(2). Is there any reason for this?
2. The most cautious approach to a bill of this kind would insert the jurisdictional requirement section (c)(2)(B) in (c)(1) as well, In other words, it would be reasonable to require an interstate commerce connection for both sections. I think that this should be enough to validate the bill against facial attack, though it is probably valid even without this change.
3. The fourteenth amendment ground is more fragile than the commerce ground, and disability and homosexuality are the most fragile of the newly included "because of" terms; including them is probably legitimate on commerce clause grounds but far less clearly so on fourteenth amendment grounds.
4. As I have noted, more factual evidence could be extremely helpful in strengthening the case for national power. The commerce issues deserve particular attention. Testimony or statements could be valuable in this regard.

CONCLUSION

In short, I believe that. with appropriate factual findings and an appropriate factual record, the bill is constitutional, and that it should and probably would be upheld as within congressional authority, particularly under the commerce clause. I would be happy to answer any questions that you might have.

Mr. HUTCHINSON. Thank you, Professor Sunstein. I know you are summarizing a very well prepared statement.

Professor Harrison?

STATEMENT OF JOHN C. HARRISON, LAW PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Mr. HARRISON. Mr. Chairman, I thank the committee.

I want to express a little more doubt than Professor Sunstein did about some of the applications of the bill. I think in some of its applications it is clearly constitutional. In others, especially after *Lopez*, it is a very doubtful constitutionality, especially under the commerce power.

Paragraph 1, as I understand it, and as Mr. Lee indicated, is grounded primarily on Congress' power to enforce the 13th amendment. Insofar as it deals with actions, violence based on race and color, it is within a line of Supreme Court cases indicating that Congress has authority in that area to deal with private action. I think the applicability of those cases in this area may be a little weaker than is commonly taken. I am not sure that *Jones* v. *Alfred Mayer*, for example, clearly provides the authority that Mr. Lee suggested that it did because *Jones* v. *Alfred Mayer* dealt specifically with the Civil Rights Act of 1866 and its statutory descendancy. Whether a new statute unrelated to that act could be adopted now, when slavery is more than 130 years old, is a difficult question. But as I said, that is a difficult question.

One part of—two parts of paragraph 1 deal with actions based on religion and national origin. Religion and national origin have not been, were never grounds of slavery when slavery existed in the United States. Congress' power to adopt that rule under section (2) of the 13th amendment, I think, is extremely doubtful.

Paragraph 1 does not provide any connection with interstate commerce, unlike paragraph 2. It does not have any requirement of a nexus with interstate commerce. It did not appear to me in reading the bill to be grounded in the commerce power. To the extent that it is, it encounters the difficulty that the law in Lopez encountered, that Congress has not made any attempt to connect what is going on there to interstate commerce. Paragraph 2 does have those commerce connections. Paragraph 2 clearly seeks to come under the commerce power and in some situations it clearly does. When the crime being punished takes place in interstate commerce or when the defendant or the victim moves in interstate commerce in connection with the crime, I think Congress' power there is quite clear.

Congress can regulate interstate commerce. There is no question about that.

Congress also has substantial authority to regulate that which affects interstate commerce, but one of the great principles of American constitutional law is that that authority, broad though it often is, is not complete. The reason it is not complete is because Congress is not an omnicompetent legislature, able to do anything it thinks is a good idea. There are limitations. Congress is a government of enumerated powers.

What the Court was struggling with in the *Lopez* case is the problem of where to draw the line, where to keep Congress from going all the way down to the bottom of the slippery slope and simply saying, Congress can regulate anything that it wants to.

One line that *Lopez* strongly suggests is the difference between economic activity and noneconomic activity. In the earlier statutes in cases that upheld them, including the Civil Rights Act of 1964, many of the New Deal regulations that the Court upheld dealt with economic activities. *Lopez* suggests that noneconomic activities, which includes a lot of crime and, hence, a lot of hate crime, simple acts of violence, indeed, is possible with hate crime, is less economic than a lot of other kinds of crime, are less connected to commerce, less connected to the national economy. And whether that would have an adequate connection to interstate commerce is doubtful, and it is doubtful primarily for this reason: It is extremely difficult to enumerate or to explain how hate crime, for instance, has an effect on interstate commerce other than most activity that takes place in the States and, in particular, other than most crimes. Yet the conclusion that Congress could regulate all crime and any crime could keep somebody from moving interstate, the conclusion that Congress could regulate all crime seems unacceptable because it then leads to the conclusion that Congress can do anything. That is the bottom of the slippery slope. The Court has indicated that it cannot go that far.

So my view is that there are probably a substantial number of crimes that would be covered by this bill that have very little to do with interstate commerce. Everything has something to do with interstate commerce, but very little to do with interstate commerce post *Lopez*, that possibly large body of crimes, subject to serious constitutional questions concerning Congress's power to adopt.

[The prepared statement of Mr. Harrison follows:]

PREPARED STATEMENT OF JOHN C. HARRISON, LAW PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Thank you Mr. Chairman. The Committee has asked that I comment on constitutional issues associated with H.R. 3081, and in particular with Congress' authority to adopt it. My conclusion is that while some of the bill's applications are clearly within congressional authority, many of its applications are very likely beyond congressional power.

H.R. 3081 would amend 18 U.S.C. 245 by adding a new subsection (c) and renumbering current subsections (c) and (d). The new subsection in turn has two paragraphs, each of which creates a new criminal prohibition that applies to all persons, whether or not acting under color of law. Because the paragraphs appear to be based on different constitutional sources of congressional authority, I will discuss them separately.

Paragraph (1) would punish certain violent crimes when committed "because of the actual or perceived race, color, religion, or national origin of any person." Because it includes violence based on race and color and because it does not refer to interstate or foreign commerce, I take it that paragraph (1) is designed to rest on Congress' enforcement power under Section 2 of the Thirteenth Amendment.

It is very difficult to conclude, from either the text of the Thirteenth Amendment or the statutes and judicial decisions applying it, that it gives Congress power with respect to private conduct based on religion or national origin. American slavery was not based on either of those characteristics. In this regard paragraph (1) is very likely beyond congressional power.

Paragraph (1) presents a more difficult question insofar as it applies to private violence based on race or color. It is often assumed today that under the Thirteenth Amendment as the Court now interprets it Congress can as a general matter prohibit private race discrimination, including discrimination in the selection of a crime victim. I think that the question is more difficult than it appears.

As an original matter, putting aside what the Court has said, it is doubtful whether a general ban on racially motivated violence could be adopted under Section 2 of the Thirteenth Amendment. We can assume that because private racial violence directed against Blacks was closely associated with slavery in the States where slavery prevailed, the power to enforce the ban on slavery would have entailed a power to forbid such violence during the aftermath of slavery.

H.R. 3081, however, differs in two significant ways from the kind of statute that might have been passed in 1865 or shortly thereafter. First, it is broader than the violence associated with slavery, which was directed against Blacks. It encompasses all violent crimes motivated by race and color. Racially motivated violence directed against Asians, for example, was not part and parcel of slavery.

Second, slavery is now a bitter memory, not a current or recent practice in this country. It is doubtful whether in 1998 even racially motivated violence directed at Blacks is an aspect of the system of slavery. There is no system of slavery. (I do not mean to suggest that Congress could not today pass the peonage statute. Peonage is not a practice that once was, but no longer is, an aspect of a system of slavery; it is slavery.)

Despite what I have just said, the Supreme Court's doctrine on this subject is often taken to mean that Congress can act against private race discrimination pursuant to Section 2 of the Thirteenth Amendment. I think the implication of the Court's cases is less clear than might appear. The cases that are usually pointed to in this context, especially Jones v. Alfred H. Mayer, 392 U.S. 409 (1968), and McDonald v. Santa Fe Trail Transport Co., 427 U.S. 273 (1976), are about the Civil Rights Act of 1866 and its statutory descendants. When that law was adopted slavery had been gone for less than a year and it was plausible to contend that the Black Codes that the act was designed to nullify were an attempt to restore part of the system of slavery.

The Court has concluded that the 1866 Act was valid when adopted and that it can continue to apply. That conclusion does not necessarily imply, however, that a statute adopted for the first time in 1998 that deals with an issue quite separate from that dealt with by the 1866 Act also would be sustained. The courts may be very reluctant to say that a statute, valid when adopted, is no longer valid because circumstances have changed; to allow such creeping unconstitutionality could destabilize the law. Moreover, there are reasons to treat the Civil Rights Act of 1866 as special. It was a central feature of Reconstruction and reflected a specific conclusion about the Thirteenth Amendment reached after much debate and a presidential veto. Insofar as the continuing constitutionality of the 1866 Act reflects its unique place in the American law of race discrimination, it would be hazardous to general-

ize to the principle that Congress today may legislate with regard to all private conduct that is based on race or color.

By raising this question I do not mean to say that paragraph (1) is clearly unconstitutional in its application to violence based on race and color. It may well be constitutional under the Court's doctrine. I do want to suggest that it would be unwise to assume that the question is an easy one.

Paragraph (2) appears to rest on Congress' power to regulate interstate and foreign commerce and its authority under the Necessary and Proper Clause to pass laws that carry out the power to regulate commerce. Once again, different applications of the bill present differing levels of constitutional difficulty.

Paragraph (2) criminalizes certain acts of violence:

(i) that are in interstate or foreign commerce;

(ii) in connection with which the defendant or the victim moves in interstate or foreign commerce;

(iii) in connection with which the defendant or the victim uses a facility or instrumentality of interstate or foreign commerce; and

(iv) that affect interstate or foreign commerce.

I have arranged those applications of the act in ascending order of constitutional difficulty. Crimes committed in interstate and foreign commerce are plainly within Congress' power to regulate such commerce, a power the Supreme Court has held to be plenary—that is, not limited to purposes having to do with commerce. Congress can ban conduct that constitutes interstate commerce for any otherwise-constitutional reason that Congress thinks adequate.[1]

It is also quite likely that Congress can forbid violent crime in which the criminal or the victim moves in interstate commerce in connection with the offense. While the crime itself may not constitute interstate commerce (or indeed commerce at all), this intimate connection with interstate transportation generally supports congressional jurisdiction.

The third category is more problematic. In some circumstances the use of a facility or instrumentality of interstate commerce will be so closely associated with the crime that congressional power will be clear. In other circumstances the connection may be quite tangential. In the latter case, the constitutional questions raised are essentially those encountered in the fourth category, in which the offense affects interstate commerce.

In some sense virtually anything anyone might do affects interstate commerce. Therefore, if Congress has the power to regulate all conduct that affects interstate commerce it has the power to regulate all conduct. The latter conclusion, however, is inconsistent with the basic principle of the Constitution: that Congress possesses only enumerated powers and is not an omni-competent legislature. For the last 200 years, one of the central problems of constitutional doctrine has been the enunciation of limiting principles that will give congressional power, and especially the commerce power, its due scope without swallowing up the principle of enumeration.

The Supreme Court case closest on point here, one in which the Court once again wrestled with this problem, is United States v. Lopez, 115 S. Ct. 1624 (1995). That case held that a congressional ban on possession of a gun within a stated distance of a school went beyond the commerce power. The majority in *Lopez* recognized that there must be limits to Congress' power over matters with some effect on interstate commerce. While it is difficult to know the doctrine of *Lopez* with any precision, the case does seem to stand for the proposition that congressional attempts to regulate non-economic conduct that takes place within one State must be based on a strong reason to believe that such conduct has a substantial effect on interstate or foreign commerce.

Many, perhaps most, of the crimes covered by H.R. 3081 fall within the zone made very doubtful by *Lopez*. They are local. They have no real interstate nexus. They are not part of the national economy, which the Court has come to assume is substantially interconnected. In their effect on commerce they are difficult if not impossible to distinguish from anything else done in a State, so that their regulation by Congress is subject to the objection that there is no stopping place if such conduct can be regulated.

Under the Court's current doctrine it is likely that many of the crimes that H.R. 3081 is designed to punish would be held to have an inadequate connection with interstate commerce to support congressional authority. In the alternative, it is possible that the bill, if adopted, would be interpreted not to apply to many crimes because of the constitutional doubts associated with its application. In either event,

[1] When I refer to interstate commerce that term includes, where appropriate in context, foreign commerce.

it is quite possible that its application ultimately would be substantially more restricted that its proponents hope.

What I have said so far is about the likely judicial reaction to H.R. 3081. There is more to the constitutional question confronting this Committee and the Congress, however. As the Supreme Court has made clear since M'Culloch v. Maryland, 17 U.S. 316 (1819), the courts are to give substantial deference to Congress concerning the practical and policy questions that must be resolved when Congress chooses a means—here punishment of certain local crimes—to pursue an end that the Constitution authorizes it to pursue—here, policy with respect to interstate commerce.

As John Marshall said in *M'Culloch*, often those questions of fact and degree are for another place, not for the courts. This Committee is that other place. Here the question is not whether the courts, deferring to Congress, would uphold the bill. The question is whether the bill is legitimately proportioned to congressional policy concerning commerce among the several States or with foreign nations. That question is not for the courts, but for each Member's conscience. In this context it seems to me a difficult question indeed.

Finally, I should mention that I have not discussed congressional power under Section 5 of the Fourteenth Amendment because the bill does not appear to be predicated on that power. For example, it contains no finding that the States have defaulted in their obligation to provide the equal protection of the laws.

My testimony concerns the allocation of authority within the American federal Union. It does not concern the question whether some American government should punish the vicious crimes at which this bill is aimed. The conclusion that the Constitution allocates much of the authority to deal with this problem to the States should not surprise or disturb us. Under the Constitution murder is in general to be dealt with by the States, which are vigilant to punish it. With respect to violent crime in general the role of the States is primary and that of Congress supplementary. The loathing inspired by the conduct at issue in this bill should not cause us to lose sight of constitutional principles.

Mr. HUTCHINSON. Thank you, Professor Harrison.

Mr. Bangerter?

STATEMENT OF MARC BANGERTER, VICTIM, BOISE, ID

Mr. BANGERTER. My name is Marc Bangerter. I am from Boise, Idaho. Thank you, Mr. Chairman and committee members, for allowing me to testify.

In April of this year, I was brutally attacked. One assailant beat me three times in the same night and left me unconscious in the gutter. He perceived me to be gay.

Mr. Chairman, I am not gay, but that did not save me from this beating. I have learned a lot about hate crimes, and from my experience I have learned that Federal law needs to be changed.

On April 15, at 9:30 p.m., I was sitting with a friend, Bill, having a drink in a downtown Boise bar. We sat down at a table and while we were talking a man sat down uninvited. Bill was about to leave. We finished our drinks. I gave Bill a hug. It is not uncommon for me to hug my friends. I moved further away from the guy who had sat down uninvited. Suddenly, he said, you F-ing faggot and punched me in the head with his closed fist. I was stunned.

Not wanting any trouble, I got up and left the bar.

I was outside not far from the door and suddenly the same guy was on me again. He had me on the ground on my back strangling me. I was trying to shout; I could not. I thought he would kill me. The owner of the bar came out and must have scared him off. I was dazed, dazed and stunned, but I said to the owner that I was okay and I was going home. I walked the one block to my home. I was badly shaken. I saw one of my friends. He suggested we go for a ride to calm my nerves. A few minutes later, to meet him, I walked

out of my flat. Suddenly the same guy that attacked me was back only inches from my face.

The next I remember the paramedics were strapping my head to a stretcher. Witnesses said the assailant was kicking me, kicking me while I was lying in the street, my head against the curb, even though I was already unconscious. He was using the sidewalk curb as a backstop and continued to kick my head until witnesses stopped the attack.

He ran off. He has not been caught. Because of this attack I have total and permanent loss of vision in my left eye. The bones around my eye sockets have been broken, and I will have extensive reconstructive surgery in August to repair the bones in my sinuses.

Unfortunately, Boise police have not pursued my case satisfactorily. In fact, it wasn't until 5 days after the attack that a detective was assigned to the case. I gave him a description of the attacker and he said he would begin looking into it. The following weeks I heard almost nothing. I called often for an update. The detective said he was responsible for over 70 cases and was not able to give my case a lot of attention.

After more weeks of not hearing much from the detective or anyone on the police force I became frustrated. I called the FBI, the governor's office, the mayor's office, Senator Kempthorne's office and others.

On July 1, I received a letter from the FBI about my case.

This is what the second paragraph of the letter says, "Your case was thoroughly discussed with the United States Attorney's office in Boise, Idaho, in order to explore prosecution under hate crime laws. I must regrettably inform you that as a result of these discussions it was determined that sexual orientation does not fall within the listed elements of hate crimes. Therefore, the FBI lacks the statutory authority to investigate the attacks against you."

The governor's office filed a complaint with the Boise police department on my behalf. Their response by telephone was, because of your recent contact with the governor's office we will probably be required to refer your case to another agency, probably the FBI.

Mr. Chairman, the Boise police have mishandled my case and think they can turn it over to the FBI, but the FBI has no jurisdiction over my case because the hate crime was committed because of my perceived sexual orientation.

Idaho has a hate crime law, but it too does not include sexual orientation. It is a Catch-22 and victims like myself simply fall through the cracks.

Before the beating I was an artist by trade. I have painted and exhibited all over the world.

Mr. CONYERS. Excuse me, Mr. Bangerter, could you pull the mike up closer, please.

Mr. BANGERTER. Yes.

Before the beating I was an artist. I have painted and exhibited all over the world and I am well-known in Boise. I have not been able to paint since the attack. Having lost total eyesight in my left eye I no longer have depth perception. Obviously this will affect my painting and my life. In ways I am just beginning to know my life has been permanently altered. Someone hated gay people enough to try and kill one.

I am not gay. This happened to me because I hugged a friend. I know what can happen to gay people and those perceived to be gay. Now I have firsthand knowledge that the Federal hate crime laws on the books need to be changed now, which it makes no sense that the FBI can investigate, for example, a religious based hate crime but not a hate crime permitted because someone is perceived to be gay, is gay, disabled or because of gender. I hope Congress will realize that the Federal law enforcement should be able to step in when needed no matter who has been harmed. This loophole to jurisdiction must be closed.

Thank you. I would be happy to answer any questions.

Mr. HUTCHINSON. Thank you, sir. That was very compelling testimony you offered.

Now, Mr. Devine.

STATEMENT OF RICHARD A. DEVINE, STATE ATTORNEY OF COOK COUNTY, IL

Mr. DEVINE. Thank you. I would prefer to be called professor, but I am a lowly state's attorney. I am the state's attorney of Cook County, a jurisdiction of approximately 5 million people, including the City of Chicago. With more than 900 assistant state's attorneys we are the second largest prosecutor's office in the country. I appreciate the invitation to come before your committee today and I appreciate the opportunity to discuss the bill you are considering and to describe what we are already doing in Cook County about hate crime.

As Congressman Delahunt noted, I am a member of the National District Attorneys Association and I am on its board but I should stress that I am here today solely as the Cook County state's attorney.

I support a Federal hate crime law that gives victims the help they deserve when local prosecution cannot or will not act and for a law that gives Federal help to local prosecutors who seek it. Put plainly, when local prosecutors are doing the job, let them. If they need help, give it.

The Federal Government should augment local prosecution, not supplant it. I am heartened to see persons such as Assistant Attorney General Bill Lee and Deputy Attorney General Eric Holder share my belief that Federal law should not displace vigorous local prosecution. I support extending appropriate Federal protection to those victimized because of their gender, sexual orientation or disability.

Illinois law already does this.

I applaud the authors of this legislation for seeking to fill these gaps in current Federal law.

The passage of appropriate Federal legislation should encourage some of our States to either pass hate crime laws or strengthen the laws they already have. Today more than half of our States do not have the coverage that the proposed Federal law provides. Today Illinois hate crime law covers most of the bases, but it evolved over a period of time.

The story of that evolution and our current status is set forth in our manual called "Hate Crime: A Prosecutors Guide," which our office has published and which has been sent to every member of

this committee. We published our second edition and sent hundreds of copies to fellow prosecutors. Illinois hate law applies when certain crimes are committed because of a person's real or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability or national origin. A first offense is a class 4 felony with a possible sentence of 1 to 3 years and a second offense is a class 2 felony with a possible sentence of 3 to 7 years in prison.

Perhaps even more important, a separate sentencing statute creates factors in aggravation, making enhanced penalties possible. We have used this provision many times in Illinois to secure more severe sentences where, for example, an aggravated battery or attempted murder was motivated by racial or religious hatred.

Illinois law also allows the victims to file civil suits for damages. Let met say, Mr. Chairman and members, that hate crimes are different. To put it in perhaps the starkest way I can imagine, to have graffiti on a wall that says "John loves Suzy" is one thing, but to have a Nazi swastika on the wall of a synagogue in West Rogers Park in Chicago, Illinois, is much, much different and also has a much greater impact on the community.

Our current law serves us well in Cook County, which is both large and diverse with significant numbers of vulnerable groups of populations. We try to be vigilant in our prosecutions, but we also recognize there are additional steps for our office to take. Our victim witness unit has a hate crimes specialist to explain a sometimes confusing and intimidating criminal justice system to the victims. I have expanded our prosecution counsel, which includes members of our diverse communities who advise our office on issues and possible solutions.

We have redone our hate crime brochure and posted it on our web page. We recently held an all day hate crime town meeting. At that meeting we had speakers from throughout the country, including Reginald Robinson, then-deputy associate attorney general, speaking to us on topics on hate crimes and various other aspects. That was a well attended town hall meeting and, most importantly, a number of high school students throughout Cook County attended. These are a number of things we have done, but perhaps the best statement of our commitment comes from cases prosecuted by our office. Let me cite just a few examples.

After a man beat and threw another man out of a fourth floor window, we argued that the attack came partly because of the victim's sexual orientation. The defendant received an extended term of 40 years in prison. Just weeks after being released from prison, a serial rapist raped 8 women in 2 months. We argued aggravation for a greater sentence because his attacks were generated from his hatred of women. He received the maximum sentence under the law and should never walk free again.

While these convictions and others I note in my prepared statement only deal with the results of hate, they do not eliminate it. Given that reality, we must commit ourselves to fight against hate crime, which not only injures and humiliates a victim but attacks the very fabric of our community.

In Cook County we have demonstrated our commitment on this issue, and well crafted Federal legislation will help us all do the job better.

Thank you, sir.

[The prepared statement of Mr. Devine follows:]

PREPARED STATEMENT OF RICHARD A. DEVINE, STATE ATTORNEY OF COOK COUNTY, IL

SUMMARY

I am Richard A. Devine, State's Attorney of Cook County, Illinois, since December 2, 1996. With more than 900 attorneys, ours is the nation's second-largest prosecutorial office. I support a Federal hate crimes law that helps victims when local prosecution can not or will not act, and that gives Federal help to local prosecutors who seek it. When local prosecutors are doing the job, let them. If they need help, give it. I support extending appropriate Federal protection beyond those exercising federally protected rights, and extending it to gender, sexual orientation or disability.

Appropriate Federal legislation should encourage other States to pass or strengthen hate crime laws. Illinois hate crime law is strong. It is described in our *Hate Crime: A Prosecutor's Guide*, which we send to prosecutors in Illinois and across the country. Illinois hate crime law (720 ilcs 5/12–7.1) protects those victimized because of real or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals. A first offense hate crime raises various misdemeanors to a class four felony with a possible sentence of one to three years; a second conviction is a class two with a possible three to seven years. "Factors in aggravation" allow greater sentences for all felonies committed because of the same factors listed above. Illinois law also allows damage suits. Over the past 10 years, hate crime reports have fallen in Cook County.

We assigned a hate crime specialist to our victim witness unit; expanded our hate crime prosecution council to include more leaders of our diverse communities; redid our hate crime brochure and posted it on our web page (@www.statesattorney.org); and held a hate crime town hall meeting in the Fall of 1997. We want the community, especially victims, to know that we are committed in the fight against hate crime, which injures and humiliates a person and corrodes a society.

STATEMENT

My name is Richard A. Devine. I am the State's Attorney of Cook County, Illinois. Cook County is home to the city of Chicago, to some 147 suburban municipalities, to a significant unincorporated area, and to more than five million people.

Thank you for your invitation to come before this committee today to discuss the possibility of enhancing Federal hate crime law. Hate crime is one of our office's major focuses, and I appreciate this opportunity to both discuss the bill you are considering, and to describe what we already do in Cook County about hate crime.

With more than 900 assistant State's Attorneys, ours is the second-largest prosecutorial office in the nation. We prosecute all State felonies and misdemeanors in Cook County, and represent Cook County government and its officers and employees who are parties to law suits.

I was elected in November, 1996, and was sworn in as State's Attorney on December 2, 1996. This is not my first experience in the office. That came from 1980 to 1983 when I was first assistant to former State's Attorney Richard M. Daley, now Mayor of Chicago. I ran for State's Attorney because I believe in upholding the law for the victims of crime. I am a vice president of the National District Attorney's Association, which serves as a forum for prosecutors around the country to discuss such important topics as hate crime.

But I am here today not as a representative of any group, but only as the Cook County State's Attorney. I want to express my support for a Federal hate crimes prevention law that gives victims the help they deserve when local prosecutors can not or will not act, and for a law that gives Federal help to local prosecutors who seek it. Put plainly, when local prosecutors are doing the job, let them. If they need help, give it. I believe that the Federal Government should augment local prosecution, not supplant it.

I wholeheartedly support extending appropriate Federal protection to those victimized on account of their gender, sexual orientation or disability. Illinois law already does that, and current Federal law is badly truncated in not covering such victims. I also approve of extending appropriate Federal protection to victims beyond

those who are exercising certain federally protected rights. I applaud the authors of this legislation for seeking to correct these deficiencies.

I am heartened to see that others share my belief that Federal law should not displace vigorous local prosecution of hate crime. Deputy Attorney General Eric Holder has said that federal jurisdiction is needed only to permit joint investigations with local prosecutors, and when local prosecutors are either unable or unwilling to pursue cases. I agree.

Such concerns aside, appropriate Federal legislation should encourage other States to either pass hate crime laws or strengthen the laws they already have on the books. Today, Illinois hate crime law covers most of the bases. But it did evolve.

The story of that evolution is in the book, *Hate Crime: A Prosecutor's Guide*, which our office published, and which has been sent to every member of this committee. That manual is unique in this country, and we make it available to all prosecutors in Illinois and across the country. We recently updated and published our second edition, and already have sent out hundreds of copies.

Illinois' current hate crime law can be traced back to 1983, when the Illinois legislature passed an ethnic intimidation statute to cover crimes against persons on account of race or ethnicity. "Ethnic intimidation" became "hate crime" in 1991, a recognition that hate crimes are motivated by biases other than racial or ethnic hatred. Gender was added as a protected class in 1992, and hate crime became a felony in 1993. In Illinois, the law recognizes that a hate crime is committed against both an individual and the community of which he or she is a member.

Illinois hate crime law (720 ilcs 5/12–7.1) applies when certain crimes—assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action, disorderly conduct and harassment by telephone—are committed because of a person's real or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals.

A first offense hate crime raises various misdemeanors to a class four felony with a possible sentence of one to three years, and a second offense is a class two felony with a possible sentence of three to seven years in prison. When there is probation, the court may assign community work. A separate sentencing statute creates "factors in aggravation," whereby greater sentences are possible for all felonies committed because of race, religion and the other factors I mentioned. Illinois law also allows victims to file civil suits for damages, and some major awards have been won.

This law serves us well in Cook County, which is not merely large but very diverse, with significant numbers of vulnerable populations. We have been vigorous in our prosecution of hate crimes, and the results are promising—over the past 10 years, hate crime reports have generally fallen. In Chicago, for example, police reported 127 incidents for the first six months of 1997, and 99 incidents for the first six months of 1998.

Local law enforcement must do more. Our office has taken other steps to enable victims to come forward, make charges and to stay the course when they do.

Our victim witness unit has a hate crime specialist to work with hate crime victims to explain a sometimes confusing and intimidating system. One of the first things I did as State's Attorney was to expand and strengthen our hate crime prosecution council, which includes leaders of all the diverse communities in Cook County, who advise me on issues.

We have redone a hate crime brochure and posted it on our web page (@www.statesattorney.org). I am especially proud of the hate crime town hall meeting we held in the Fall of 1997, which we co-sponsored with the Chicago Human Relations Foundation and Northwestern University's Medill School of Journalism. We heard from persons around the country, including Reginald L. Robinson, Deputy Associate Attorney General.

Our concerted efforts hopefully inform the community at large, and especially groups whose members tend to be victims, that the Cook County State's Attorney's office is a committed force against hate crime.

But the best statement of commitment comes from prosecution. It is worth citing a few examples of hate crime cases brought by our office:

Jonathan Haynes confessed to killing a man who worked as a hair colorist in San Francisco and to killing a plastic surgeon in a suburb of Chicago. He expressed his fundamental sympathy with the neo-Nazi movement. As such, he sought to kill those people who assisted others in altering their appearance to look more Aryan. He was sentenced to death.

In a case involving a savage beating of a man who was thrown from a fourth-floor window, we charged attempt murder and robbery and argued in aggravation

that the attack was partly motivated because of the victim's sexual orientation. The defendant was sentenced to 40 years in jail.

A serial rapist assaulted eight women in a two-month period just weeks after being released from prison for committing another rape. We argued in aggravation for a greater sentence because his brutal attacks stemmed from a hatred of women. He received the maximum sentence under law and should never walk free again.

A man harassed his neighbor for months, calling him "a wetback Mexican," and finally threatened him with a lead pipe. The neighbor sold his home at a loss to escape. We charged the man with a hate crime and won a conviction.

While these results are gratifying, they only deal with the results of hate. They do not eliminate it. Until that day, we must marshall our best resources and commit ourselves to fight a crime that injures and humiliates a person and corrodes a society. In Cook County, we are committed—fully—to this fight. We believe that the Federal Government should put an appropriate and effective hate crime law on the books, one that extends protections to victims where victims cannot otherwise get those protections.

Thank you for this opportunity to speak. I will be glad to answer any questions.

Mr. HUTCHINSON. Thank you very much, Mr. Devine.

Now, Professor McDevitt.

STATEMENT OF JACK McDEVITT, LAW PROFESSOR, CO-DIRECTOR, THE CENTER FOR CRIMINAL JUSTICE POLICY RESEARCH, NORTHEASTERN UNIVERSITY LAW SCHOOL, BOSTON, MA

Mr. MCDEVITT. Thank you. I want to thank the committee again for these hearings. It is an important piece of legislation that I support.

I want to talk just briefly about what the research shows about hate crime, what we know about what these incidents are like. I have been doing research on hate crimes for the past 10 years. I reviewed thousands of incidents. I have spoken to hundreds of victims and interviewed dozens of offenders. One thing that comes out in the testimony is the fact there are—these crimes are different and there are elements that make them different.

The vulnerability of the victim, level of injury and nature of the crime sends a message. First of all, when a victim is attacked in a hate crime, they are incredibly vulnerable, they feel this can happen any place because they carry the cause of victimization with them.

One of the things—I am a criminologist, and say if a student—say he comes home from a party late at night. I can do a lot of things to help that student feel like it won't happen again. I can tell him to come home earlier, travel with a friend, Lord knows I can tell him to go to the library instead of the party.

But what can I tell a victim attacked because they are black? Because they are Asian? Or because someone thinks they might be gay or lesbian. What can we say to that person to make them feel less vulnerable? They are still black. After the ride home on the metro they are still Asian. When they get home at night and should be secure, that is when the rocks can come through the windows because someone may think they are physically disabled or gay.

A second element of those crimes that is different is the level of injury. The research is still out on this, but the best research we have seems to indicate two things, that assaults that are as you just heard described are incredibly violent. What happens is Bill Johnston, a police officer retired from the Boston police department

who has done a lot of work on this over the years, if you can define somebody that is different then it is all right to beat them up because different is good in many—different is less than I. If it is less than you, it is okay to beat them.

In Boston data we reviewed, assaults that were motivated by hate were three times more likely to need hospital treatment than assaults in the rest of the city. In recent research by Gregg Herrick done at the University of California Davis he talked to victims of gay bashings and found in those instances the victims suffered more trauma and the trauma lasted a longer period of time than it did in other kinds of crimes. So in fact these crimes are different and that is real.

The final element in these crimes that I wanted to mention goes back to something that Representative Schumer said in the beginning. These crimes are about messages. What you are doing today is important. These crimes are about messages. When an offender attacks someone because they are black or they think they might be gay, they are sending the message to the community we do not want those people in our community, in our workplace, on our college campus.

After interviewing these young men, it is mostly young men, they see themselves as heroes acting out what everybody out there believes. They are the brave ones. They acted it out.

When a victim gets attacked because they are black or because they are perceived to be gay, then they come in and first thing they say, does everybody feel the same way in this community? Do they all want me to leave?

It is important we send the message back that we won't tolerate that kind of behavior in the community. This legislation helps to send that message. Victims look to the law enforcement authorities and political officials to say is this something you are going to prohibit and you are not to be the victims. We need to send the message to the offender that we don't share his beliefs. We have to send the message to the victims we want you to be a part of our community, we are not like that victimizer.

The legislation you are putting together today has the power to send that message and, as you heard before in Bill Lann Lee's testimony, it is not just symbolic. These crimes are difficult to solve. The arrest rate in hate crimes is about 15 percent. So what happens is these are very difficult to solve. If we can help by offering in a few cases the services of the FBI to do forensics and crime lab information, that may help us solve some of these crimes and bring the perpetrators back.

Thank you.

[The prepared statement of Mr. McDevitt follows:]

PREPARED STATEMENT OF JACK MCDEVITT, LAW PROFESSOR, CO-DIRECTOR, THE CENTER FOR CRIMINAL JUSTICE POLICY RESEARCH, NORTHEASTERN UNIVERSITY LAW SCHOOL, BOSTON, MA

I am speaking today in support of The Hate Crime Prevention Act of 1997 sponsored by Representative Schumer, representative McCollum and others. I have been involved in hate crime research for more than 10 years and believe that this is one of the most important pieces of legislation proposed over that period.

My Background

I am a Professor in The College of Criminal Justice at Northeastern University and Co-Director of The Center For Criminal Justice Policy Research. I have written extensively about hate crime including co-authoring (with Jack Levin) a 1993 book *Hate Crimes: A Rising Tide of Bigotry and Bloodshed*. I have also worked with the FBI and the Bureau of Justice Statistics in preparing *Hate Crime 1990: A Resource Book*. Presently I am involved in two projects, one funded by the National Institute of Justice to measure the impact of hate crimes on victims when compared to other crime victims, and the second involves working, with the Bureau of Justice Statistics in a project cleared to improve the current state of hate crime reporting across the United States.

Impact on Victims

A number of critics of this legislation have correctly pointed out that most of the crimes covered by this act are already illegal. The argument then proceeds that hate crime legislation is unnecessary. Prior research by Jack Levin and I, however, indicates that this interpretation is wrong. After reviewing tens of thousands of cases, and interviewing hundreds of victims and dozens of offenders it has become clear that these crimes are in fact different, and as such require a different response from the law enforcement community.

Hate Crimes are different from many other crimes in at least three ways; they are intended to send a message to the victim and members of the victims group, they generate an unusual sense of vulnerability in victims, and they tend to involve more violence than other crimes. First, hate crimes are "message crimes." The offender in a hate crime is trying to send a message that members of a certain groups are not wanted in a particular neighborhood, community, workplace or college campus. The, offender frequently sees himself as a heroic figure, one who acts while other who share his beliefs are afraid to take action. These offenders believe that most other members of the community share their bigoted thoughts but won't act because of fear. These offenders and would be offenders need to get a message from the community that most people in fact do not agree with them and that violence against individuals based on their difference will not be tolerated and will be severely punished. A statement by the federal government that they stand ready to prosecute offenders who commit these acts of violence will go a long way in sending that message.

In addition, interviews with victims who have experienced hate crimes indicate that they feel incredibly vulnerable after a hate motivated victimization. They feel vulnerable because they carry with them the cause of their victimization, their race ethnicity, or religion for example. As a criminologist, I can help victims most non-bias crimes deal with the aftermath of most victimizations. We know how to recommend changes to the victims lifestyle that will reduce the likelihood that a similar victimization will occur in the future. We can recommend for example, additional security around their home or car, changing their route to work, or jogging with a friend not alone. But in hate crimes the victim is selected because of her race or ethnicity or some other personal characteristic. How can that victim change the fact that they are black or Latino? What can they do to reduce the likelihood that this crime will happen again? Equally troubling is that in some cases the victim does not even posses the characteristic, but is perceived to "be gay" for example, by the offenders. Hate crime victims report feeling incredibly vulnerable because they could be attacked wherever they go, commuting to work, at work or at home after work, and there is nothing a victim can do to change that characteristic that has caused her to be selected.

Another area of victim impact is in the severity of these crimes. Prior research in Boston, and recent research done by Professor Gregory Herek from The University of California at Davis indicates that crimes motivated by hatred are more violent than other similar non-bias motivated crimes. In the Boston research, we found that hate crime assaults were three times more likely to require hospitalization than non hate crime assaults. In the study by Herek, he found that the victims of hate motivated crimes experienced more trauma after an attack than victims of non-bias attacks and the aftereffects lasted longer after hate motivated violence.

Typology of Offenders

In research done by Jack Levin and I, we identified three types of hate crime offenders. The first and largest group are those young men (the vast majority of hate crime offenders are male) who commit their crimes for the thrill. These offenders are not strongly committed to a racist ideology, even though they may have been exposed to racist literature, but they see certain groups as different and inferior and engage in violence against these groups for the thrill of it. In some cases offenders

have told us that they went out looking for someone different to assault, simply because they were bored! The second group of Offenders, smaller than the first group, see themselves as defending their "turf" from outsiders. This may include attacking a black family that moved into an all white neighborhood, an Asian American who has received promotion at work, or someone who is perceived to be gay or lesbian on a college campus. These attacks tend to escalate until the victim "gets the message." The final group, a very small but dangerous group, includes those we refer to as mission offenders. This group is fully committed to a supremacist ideology and has given over a significant portion of their lives to advancing their particular racist, anti-Semitic, or homophobic ideology. While relatively small in number, these individuals motivate many of the thrill or defensive offenders through their speeches, their use of the internet, their music, and their other propaganda. It is this use of these cross-state information sources that this legislation may significantly effect.

Deterrence and Hate Crimes

One of the areas that this legislation will impact is our ability to deter hate crimes before they occur. As a criminologist I am constantly frustrated by the inability of much of our present legislation to deter certain categories of offenders. For example, changes in the sentencing structure of drug offenses seems to have little impact on offenders addicted to cocaine or heroine. Hate crime may be different. Hate crime offenders get very little in return from their offenses. Bill Johnston, formally the lead hate crime investigator for the Boston Police Department, reports that all most offenders get from hate crimes are "bragging rights," the ability to tell their friends that they beat a person who was different over the weekend. If this is true, then at least for some of the hate crime offenders, if they believed that law enforcement authorities, particularly federal law enforcement, would be investigating the incident, they might decide that engaging in hate violence is not worth the risk.

Impact on the Community

The argument has often been made that existing legislation prohibiting assault or vandalism is sufficient and additional legislation such as this is not necessary. Hate crime victims do not share this feeling. When individuals are attacked because of characteristics they possess they report becoming incredibly fearful. Victims wonder if others in the community share the offenders bigotry and also want the victim to leave. When law enforcement authorities prosecute the crime as both an assault and as a hate crime, for example, it sends the message to the victims that we value you as a member of our community and we will treat, as seriously as we can, any attempt to single out members of our community because of their race, religion, ethnicity, sexual orientation, gender or disability. Victims have reported that the actions of police and prosecutors are among the most important elements in th4e healing process after a hate crime assault.

Victim Protection

This legislation offers important support for victims of hate crimes in states which lack or have limited statues prohibiting hate crimes. Presently for example, 30 states do not explicitly include in their state hate crime legislation, hate crime victims who are attacked because of their sexual orientation. A similar number of states (29) exclude victims who are targeted because of their disability. During our research over the past decade we have often encountered victims who were frustrated by their inability to prosecute offenders because of a "loophole" in state statutes. We have also encountered a number of law enforcement representatives (both police officials and local prosecutors) who report their frustration when attempting to achieve hate crime convictions based on limited or flawed local statutes.

Impact of Federal Law Enforcement

Some are concerned that this legislation might overextend the FBI's ability to provide quality investigations in hate crime cases because they fear a substantial increase in cases referred for investigation. While the actual number of referrals is not known at this time, based on prior research it would seem that only a limited number will be referred to Federal Authorities. One reason for the limited number of referrals is the desire of local prosecutors to maintain control of the most visible cases in their jurisdiction. Most hate crime cases do attract the attention of the local media (and sometimes national media) and consequently will seldom be turned over to Federal authorities except in cases where the local prosecutors are unable to prosecute under existing legislation. These are the exact cases for which this new legislation intends to provide relief.

Another reason this legislation is unlikely to place unreasonable demand on Federal Authorities is that hate crimes are a relatively rare criminal event. Federal

data compiled by the FBI indicates that 8,759 hate crimes were reported to law enforcement authorities in 1996, during that same period 1,029,814 aggravated assaults were reported.

Organized Hate Group Activity

Another area where this new legislation will improve law enforcement's ability to combat hate crimes is in those instances of hate crimes perpetrated by members of organized hate groups. While research demonstrates that a small proportion of all hate crimes are committed by organized hate groups, these particular crimes are among the most violent (Levin and McDevitt 1993). In these incredibly violent crimes perpetrated by groups such as Skinheads, the Klu Klux Klan, The White Aryan Resistance, or the Christian Identity Movement, local law enforcement is often hindered by the interstate nature of these groups. These groups often use the internet to organize members in multiple states in an effort to avoid detection and prosecution by local authorities. This new legislation will provide additionally ability to monitor these dangerous groups and intervene before an attack occurs.

Mr. HUTCHINSON. Thank you, Professor.

And the final witness, Ms. Potter.

STATEMENT OF KIMBERLY A. POTTER, CENTER FOR RESEARCH IN CRIME AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY

Ms. POTTER. Thank you, Mr. Chairman, members of the Judiciary Committee, it is a privilege to be here today to testify regarding the Hate Crimes Prevention Act of 1997.

In my recently published book, "Hate Crimes: Criminal Law & Identity Politics" coauthored with James B. Jacobs, we provide an extensive analysis of hate crime laws and a critique of the politics behind the hate crime laws, and we attempt to debunk many of the claims made about hate crime epidemics. I hope the committee will have an opportunity to examine the book and take into account some of its arguments in formulating public policy.

I am not here to testify in opposition to the Hate Crimes Prevention Act of 1997 nor is it my goal to prevent any particular piece of legislation from passing. My hope is that my testimony will provoke a careful consideration of the possible effects of this bill.

The Hate Crimes Prevention Act has some serious implications as it proposes to greatly expand Federal jurisdiction over violent conduct. It already violates most State criminal laws and they carry heavy sentences. While the murder of James Byrd by white supremacists shocks and tears at our hearts, Federal intervention is no more necessary nor appropriate in that case than in any other horrific murder. Cases in which serious bodily injury occur get top priority by State and local law enforcement officials whatever the motivation. Such is the case with James Byrd's murderers. They are facing the death penalty in Texas.

The act not only reaches the most serious and depraved crimes, but it also reaches any assault or attempted assault motivated by race, color, religion or national origin. A nexus to interstate commerce or federally protected activity in that case could no longer be required. Street mugging or altercation would be covered by the act if the perpetrator chose the victim because of race, color, religion or national origin.

At the same time the bill requires a nexus to interstate commerce for violent crimes motivated by gender, sexual orientation and disability. Arguably, fear of mugging in the subway deters some people from traveling in interstate commerce or doing busi-

ness in New York City. It seems only a short step to federalizing many other types of violent crime, such as all crimes committed with a firearm or all crimes targeting children. Such an extension of Federal jurisdiction does not seem that farfetched given the tremendous expansion of Federal jurisdiction envisioned by the bill under consideration today.

The FBI and the U. S. Attorney's offices, even with the added staffing promised by the Act, cannot and should not function as front line law enforcement agencies for State and local crimes. There is no reason to think that local police and prosecutors do a less competent job of handling violent crime motivated by certain prejudices than they do with crimes otherwise motivated. The more State and local crime assigned to Federal law enforcement, the fewer the resources available for distinctly Federal crimes like terrorism, counterfeiting and organized crime.

Despite the huge expansion of Federal jurisdictions the bill's sponsors and supporters envision only a modest increase in the annual number of hate crime prosecutions per year from approximately six Federal hate crime cases to perhaps a dozen prosecutions each year. Further, each prosecution under the bill must be approved by the Attorney General or another designated Justice Department official. Perhaps this indicates that the sponsors do not really see a serious problem necessitating added Federal intervention or a serious role for Federal authorities. But it may not be so easy for the FBI and the Department of Justice to keep their jurisdiction limited. The act may create some real problems for the FBI and the Department of Justice. Bias crime victims and advocacy groups will demand the intervention by the FBI and the U. S. Attorney's offices if only to demonstrate the importance of certain crimes or if they feel that local law enforcement agencies are not reacting properly.

I notice the red light is on. I will keep it brief.

Mr. HUTCHINSON. If you would summarize and conclude, that would be fine.

Ms. POTTER. There are also double jeopardy issues. Currently Federal authorities can take a second bite of the apple, but certainly in far fewer cases than they would under this act.

Given the vast number of cases where the Federal Government would have a chance to prosecute, making the decision about which cases to prosecute would be difficult and politically sensitive. Whichever cases the Federal authorities decide to prosecute can and perhaps would result in very divisive politics.

That concludes my statement. Thank you.

[The prepared statement of Ms. Potter follows:]

PREPARED STATEMENT OF KIMBERLY A. POTTER, CENTER FOR RESEARCH IN CRIME AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY

CO-AUTHOR WITH JAMES B. JACOBS, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS (Oxford University Press, 1998).

Members of the Judiciary Committee: It is a privilege to be here today to testify regarding the Hate Crimes Prevention Act of 1997. In my recently published book, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS, co-authored with James B. Jacobs, we provide an extensive analysis and critique of hate crime laws, the politics behind hate crime laws, and debunk the numerous claims of a hate crime epidemic. I hope the Committee will have an opportunity to examine this book and take into account its arguments. I am not here to testify in opposition to the Hate Crimes

Prevention Act of 1997, nor do I wish to prevent any particular legislation from passing. My hope is that my testimony will provoke a careful consideration of the possible effects of H.R. 3081.

The Hate Crimes Prevention Act of 1997 has serious implications as it proposes to greatly expand federal jurisdiction over violent conduct that already violates state criminal laws that carry heavy sentences. While the murder of James Byrd by white supremacists, shocks and tears at our hearts, federal intervention is no more necessary or appropriate in this case than in any horrific murder. Cases in which serious bodily injury occur get top priority by state and local law enforcement officials, whatever the motivation. Such is the case with James Byrd's murderers—they are facing the death penalty in Texas.

The Hate Crimes Prevention Act of 1997 not only reaches the most serious and depraved crimes, but any assault or attempted assault motivated by race, color, religion, or national origin. A nexus to interstate commerce or a federally protected activity would no longer be required. Any street mugging or altercation would be covered by the Act if the perpetrator chose the victim because of race, color, religion or national origin. At the same time, the bill requires a nexus to interstate commerce for violent crimes motivated by gender, sexual orientation, and disability prejudices. Arguably, fear of mugging in the subway deters some people from traveling in interstate commerce or doing business in New York City. It is only a short step to federalizing all violent crime, or all crime committed with a firearm, or all violent crime involving children. Such an expansion of federal jurisdiction does not seem that far-fetched given the tremendous expansion of federal jurisdiction envisioned by the bill under consideration today.

The FBI and the U.S. attorneys offices, even with added staffing promised by the Act, cannot and should not function as front line law enforcement agencies for state and local crimes. There is no reason to think that local police and prosecutors do a less competent job handling violent crime motivated by certain prejudices than they do with crime otherwise motivated. The more state and local crime that is assigned to federal law enforcement, the fewer the resources available for distinctly federal crimes like terrorism, counterfeiting, espionage, large-scale drug importation, money laundering, and organized crime.

Despite the huge expansion of federal jurisdiction, the bill's sponsors envision only a modest increase in the annual number of federal hate crime prosecutions—from approximately six federal hate crime cases to "perhaps a dozen prosecutions per year." Further, each prosecution under the bill must be approved by the Attorney General or another designated Justice Department official. Perhaps this indicates that the sponsors do not really see a serious problem necessitating added federal intervention or a serious role for federal authorities. But it may not be so easy for the FBI and the Department of Justice to keep their jurisdiction limited. The Hate Crimes Prevention Act of 1997 may create some real problems for the FBI and the Department of Justice. Bias crime victims and advocacy groups will certainly demand the intervention of the FBI and the U.S. attorneys offices, if only to demonstrate the importance of a particular crime or because they believe local law enforcement agencies are not reacting properly.

Federal authorities will find themselves under constant political pressure to intervene. Further, the acquittal of prejudiced defendants in state court will frequently trigger demands for federal prosecution. The doctrine of dual state and federal sovereignty and the double jeopardy rule permits federal (or state) authorities to prosecute a defendant even after a state (or federal) court acquittal. The huge expansion of federal jurisdiction envisioned by this bill has some far- reaching double jeopardy implications. The federal authorities will be given a second bite at the apple in a vast number of cases, making it difficult and politically sensitive to decide which cases should be accepted for a second prosecution. Whichever cases the federal authorities chose, it will often result in a very divisive politics with different advocacy groups competing for federal attention.

Indeed, there is no need for federal law enforcement involvement unless local corruption or perhaps gross incompetence causes a breakdown of local law enforcement. Federal authorities should not intervene simply because there has been an unpopular acquittal in state court or because a particular crime gets national attention or offends a particular interest group.

Federal intervention should be the exception, not the rule. Indeed, one of the primary rationales behind the passage of 18 U.S.C. 245 in 1968 was to fill a gap created by the unwillingness of state and local authorities to prosecute crimes motivated by racial, religious, and ethnic prejudices. Supporters of the Act point to the small number of federal hate crime prosecutions as evidence that federal intervention is required and that section 245 does not work as currently drafted. Section 245 was never intended, and has never served, as an all-purpose federal hate crimes

statute. Rather, 245 (along with 241, which covers conspiracies to violate federally guaranteed rights, and 242, which covers violations of federally guaranteed rights under color of law) functions as insurance which can be called upon if, for discriminatory or other improper reasons, state and local law enforcement agencies fail to prosecute violations of civil rights.

Mr. HUTCHINSON. Thank you very much, Ms. Potter.

At this time the Chair recognizes the Ranking Member, Mr. Conyers of Michigan.

Mr. CONYERS. I want to thank all the witnesses so very much.

Ms. Potter, I have not read your book yet and you won't believe it but I am going to read it any way.

Ms. POTTER. I believe it.

Mr. CONYERS. You and I would need a whole afternoon and a panel ourselves to really deal with your commentary, which is almost unbelievable but perhaps it is consistent with your views and your book. So that is what we are here for. So I would like to in a very friendly way invite you and me to continue our discussion. It doesn't have to be a full committee hearing with lights and cameras, but we do deserve in the universe—since we have come together and this is how democracy works—maybe I am missing a lot and I need to be filled in. Maybe I can help you. Maybe the twain will never meet but we deserve that opportunity, don't we? Do you accept?

Ms. POTTER. Sure. How could I refuse?

Mr. CONYERS. Yes, thank you very much.

Okay, now, I want to commend the prosecutor of Cook County, and the hate crimes manual is excellent. I am very pleased. I have been in and out of Chicago of course a lot during my career. I know a lot of people whose last name is Daley.

Mr. DEVINE. There are several of them.

Mr. CONYERS. Yes. I get along much better with the sons than I did with the father, but that is irrelevant. I commend you for the great work you are doing.

What we need are numbers. The truth of the matter is very few of these crimes are prosecuted because they are difficult cases and what I need you to do, if you can, is to provide me with some numbers about how it operates in Chicago with the great emphasis that you not only put on it there but help other prosecutors who may not have the kind of resources to do the kind of things that you do with this subject matter.

Mr. DEVINE. Mr. Conyers, yes, through Chicago, primarily the Chicago Police Department which developed a very good record of reporting, we can provide you over the course of the last several years the number of incidents that are reported and we can provide you the number of prosecutions that have been brought.

I would just point out the number of hate crime prosecutions doesn't tell the full story. When we have a serious charge such as aggravated battery or attempted murder we very often will use the hate crime in aggravation at sentencing to maximize the number of years a person can be sentenced to. So that is a spin to it in Illinois that is very effective that I referred to briefly in my comments but doesn't show up on the number of hate crime prosecutions per se. But we will be happy to provide you with all our information on that.

Mr. CONYERS. Thank you. Because these numbers are hard to come by I have commissioned the Attorney General, the Assistant Attorney General and his staff to pull up not only the Federal numbers, which I think we have, but the State numbers, which I know we don't have, and it is quite difficult.

Mr. Bangerter, your testimony is eloquent and clear in itself. It is clear you support the legislation under review today.

Mr. BANGERTER. Yes, I do.

Mr. CONYERS. Thank you very much.

Now we come to the constitutional discussion.

Professor Harrison, I was trying to keep track of the cautionary red lights that you articulated in your testimony and the main thing I came up with was the fact that you conceded that economic activity, commerce is pretty good, it is okay for this as a constitutional basis but you questioned whether noneconomic matters could be as prosecutable.

I think that in the paragraph 1 part you raise some large reservations about the 13th amendment. Is that roughly right?

Mr. HARRISON. Let me try to clarify. As to paragraph 1 I think there are very serious questions concerning authority under section 2 of the 13th amendment to act with respect to religion and national origin. I think there is some doubt concerning even race and color, but I think that is just some doubt. I don't think that is a big problem.

The other two are a big problem because the section 2 authority comes from the power to put down slavery and everything associated with it. Slavery was about race and color, not about religion or national origin in the United States.

The distinction between economic and noneconomic activity I was talking about concerning paragraph 2 and Congress' power under the commerce power to adopt paragraph 2 is this: The Supreme Court over the last 40-50 years has gone a long way toward saying if something, even if it appears to be local, even if it just takes place in the State, if it is economic activity, about production, buying and selling, it is a commercial transaction, and the courts generally—by that I mean the Supreme Court—will assume that we have a ramified national economy and that economic activity within the States probably has effects nationwide and hence the vast bulk of it can be reached under the commerce power.

One of the important things about the *Lopez* case, the *Guns in Schools Act* case, is the majority made the point that just possessing a gun, it is not like raising wheat or buying or selling or running a hotel. It is noneconomic activity and as to that they were much less prepared to make the presumption of a serious effect on interstate commerce.

My concern is that a substantial number of hate crimes, they are crimes of violence, they are assaults, not necessarily robberies, for example; and hence they are not like buying and selling. They are not production. They are local activity, the connection of which to the national economy may well be quite tenuous. That is why I was drawing the distinction between economic and noneconomic activity. It is in *Lopez* and it probably matters for a lot of hate crimes.

Mr. CONYERS. Well, let me find out, are there a few or many constitutional scholars that are as worried about these points as you are?

Mr. HUTCHINSON. Without objection, the gentleman may be granted an additional 2 minutes and we will perhaps have another round, but I would like to insert questions in here before completion.

Mr. CONYERS. How much sleep should I lose at night over your testimony? That is, I mean, you are perfectly——

Mr. HARRISON. I hope I kept the committee awake.

Mr. CONYERS. You kept me awake today and you may keep me awake at night if you persuade me that we are on soft constitutional ground. We are not doing all of this just to go up to the Court and have Professor Harrison say, I told you so, why didn't you get it right?

So how large a body of constitutional scholarship am I up against?

Mr. HARRISON. I haven't counted but my guess is that the views I am expressing would probably be the views of a minority, but a substantial minority of constitutional law professors. It might be a good idea to ask Professor Sunstein how many people think like him, how many like me. I suspect it is more like him but not as many like me.

Mr. CONYERS. I appreciate your candor. I can think of a couple of Supreme Court jurists that don't think like me. Not hard to figure it out. We all have our—leave our bread crumbs in the snow so everybody knows mostly where everybody is coming from.

Let me stop at this point, and I will come back again.

Mr. HUTCHINSON. I thank the gentleman.

I will recognize myself for 5 minutes. I appreciate everyone's testimony, it is very instructive. I wanted to throw out a couple different concerns or questions. I think most of you were here when Mr. Lee was testifying and I had asked questions about the issue of disability. I will start with you, Mr. Devine. I think Illinois has a hate crimes statute.

Mr. DEVINE. Yes.

Mr. HUTCHINSON. Does it include disability and gender?

Mr. DEVINE. Yes it does.

Mr. HUTCHINSON. Is the incidence of hate crimes based on the nexus of gender or do your comments go to those based on race, religion and others? Nobody has mentioned the issues of disability and gender today.

Mr. DEVINE. Yes, my comments, my statement does include a support of the expansion of the Federal hate crimes to include gender and sexual preference and disability. We have that in Illinois now. It is hard to look at the historic pattern and determine whether there is more activity or just that reporting, because the law is there and prosecutors and police are paying more attention to these types of incidents, is reflecting a reality that existed for a long time but is only coming forward in the statistics. Our general take on hate crime in Illinois over the past 10 years is that the number of cases that come into the system has been reduced. We hope that is in part a reflection of our enforcement through the police and prosecutors.

Mr. HUTCHINSON. The hate crimes have decreased in your jurisdiction?

Mr. DEVINE. By the statistics, but I want to be careful because there are a lot of factors that go into the statistics. It is a real problem in Cook County, no question about that.

Mr. HUTCHINSON. Ms. Potter, is the specificity of the statute any concern, in definitions? For example, I got the impression from Mr. Lee if someone, in a mental state whether it is a disability that is covered, that is just a jury question?

Ms. POTTER. I don't think it should be left up to juries. If you are going to have disability in the law then it should be carefully defined and whether that is going to include alcoholism, drug addiction, mental illness, that is something that should be set out beforehand and not just left to the whim of juries. The purpose of the law is to create some sort of nationwide uniformity. You shouldn't let a jury in one Federal court define it differently than a jury in another.

Mr. HUTCHINSON. It is your recommendation that that be more specifically defined in the statute if it is passed?

Ms. POTTER. Yes.

Mr. HUTCHINSON. Would any other professors care to comment. Is that a need?

Mr. SUNSTEIN. I think it is a good idea. There are several definitions of disability under different Federal statute. If you want to include alcoholism and drug addiction or not and make that decision and piggyback on that Federal statute that includes it, or not. There are some broader or narrower definitions. You can build on existing law.

Mr. MCDEVITT. When you start to include a new group under the statute it may look like there hasn't been much activity toward that group until you bring it out. In Massachusetts, unless we included sexual orientation, there were no cases of sexual orientation. It leveled out to 30 cases a year. It hasn't gone through the roof or anything, but once you open the door the victims of those crimes see themselves as this is a redress available to them.

Mr. HUTCHINSON. A final question, you might start with this but we make this a prosecutable Federal offense and you get a case that fits within the Federal guidelines and it could be prosecuted in Federal or State jurisdiction, is there not a temptation for the U.S. Attorney, ordinarily, to run it through Federal court if it meets the guidelines; there might be a political reason, or the agent might need the statistic. In history of dealing with Federal prosecutors and Federal agents, is there not sometimes a battle for good statistics?

Mr. DEVINE. Let me first state that we have very good relations with the Northern District of Illinois and the U.S. Attorney there. He is a high level professional. But obviously in any area where you have people who are aggressive, there can be competitions, there can be egos involved, no doubt about that. That is why I think it is important, the suggestion made earlier by Congressman Delahunt, that the Justice Department sit with the National District Attorneys Association and the State Attorney General to work out protocols. We have 900 prosecutors in our jurisdiction. We are capable, in my view, with a good statute, good prosecutors and good

law enforcement of handling just about any crime that comes up in Cook County. That may not be true in other parts of Illinois, and other parts of the country are where the statutes are different. So there are areas to work on together, and that is why I think a Federal overlay is very appropriate. But how it gets actually played out as you indicated, Mr. Chairman, is also important. I think it behooves all of us to sit down and work out the protocols.

Mr. HUTCHINSON. My time has expired. I thank the panel.

At this time the Chair recognizes Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the Chair very much.

I thank the panel. Mr. Bangerter, let me recognize the abuse that you have taken. Let me offer to you an apology.

I think as we draw to a close, if you would allow me, and this is an area of great concern and as a Representative from Texas let me qualify and offer to say that I don't hold Texas as the poster child for hate crimes even though I say this in the shadow of some very heinous acts. I think we have a national problem.

I find great fault in the concluding of this hearing, maybe I would get some additional time, if I did not reemphasize what I think should be the tone. We have had a very civilized and very calm debate. It is not a civilized thing that happens when hate creates the atmosphere for a violent act. It is not civilized and it is happening time after time.

Let me raise two historical perspectives so I can ask my questions.

When you get into a debate about American slavery for those who continuously wish to either ignore it or give the argument that it was not me, I didn't do anything, it was not my mother or father, obviously the slave history of America is some hundreds of years ago.

But the question is not whether the economic entity of slavery, holding others for economic profit, what those who fail to recognize involvement is the brutality of slavery. It was what you did to human beings, the maiming, killing, the castrating, the taking away of family members, the violence of slavery.

Someone may in their confusion accept someone's dislike of someone else. We have the first amendment. Some crazed person may argue that in Germany, Germans had the right to dislike Jews. It wasn't the dislike that we were talking about. It is the absolute inhuman violence of gassing millions and millions of people. That is what hate is all about.

I can't sit here and be so calm to talk about what we are trying to do today. It is important, of course, to make sure that legally we have a premise, a basis, our good friend Mr. Devine has the ability to collaborate with Federal agencies and to work cooperatively, which many of his fellow attorney generals have done. But we are talking about hate.

With that in mind, Professor Sunstein—and if I pronounce your name right, I am sorry I was delayed at the time of your presentation—I would like you to comment on Professor Harrison's remarks that he made about the constitutional premise. I didn't want you to do it without somebody understanding that we are talking about hate. That winds up killing me. I can't be calm about that.

Before you answer I just want to ask Ms. Potter, is she suggesting to us that she does not want to include sexual orientation and physical disability or disability. I just need you to answer that. Do you not want those included? I apologize for not hearing your testimony.

Ms. POTTER. No, certainly not.

Ms. JACKSON LEE. I just wanted to make sure we had a consensus. Those are important elements.

Mr. Devine, I would appreciate coming from Texas seeing cooperation in Jasper, let met cite them for positive activities, the local officials reached out to the Federal officials. So I would like to ask you what tools or how do we need to better provide opportunities, if I am reading your title correctly, State Attorney of Cook County, Illinois, how can we better collaborate? I heard the first point, let's sit down and meet but after you meet, there are translation problems. So after Professor Sunstein, I would appreciate it if you would comment.

Mr. SUNSTEIN. The simplest answer is I agree with Professor Harrison's suggestion that the majority view is my view; that is, that this statute would be upheld on its face even after the *Lopez* case. So the majority view is don't lose any sleep over the constitutional issue.

The slightly more complicated, only slightly more complicated view is you can take care of Professor Harrison's concerns, which are a reasonable minority position. I don't think it is what the lower courts or Supreme Court would do, but it is a reasonable minority position.

You can take care of those concerns with some minor changes in wording here if you inserted the jurisdictional predicate that is in section 2 now, in section 1, also, then you—that 5 minutes of sleep you might otherwise lose—I wouldn't advise you to lose that, but that 5 minutes of sleep you would otherwise lose you would not have to lose.

Ms. JACKSON LEE. Are you talking about the commerce aspect to section 1 as it is in section 2?

Mr. SUNSTEIN. That would remove any doubt.

Ms. JACKSON LEE. If I left one as it is and two as it is, I take issue with two by the way, you say the majority viewpoint would uphold, would not have a constitutional problem?

Mr. SUNSTEIN. I think you would win by a substantial majority of the current vote, a split vote but by a substantial majority you would win. That is my hunch.

Ms. JACKSON LEE. Mr. Chairman, could I——

Mr. HUTCHINSON. Do you seek additional time?

Ms. JACKSON LEE. I do, and I wanted to say, Mr. Chairman, I hesitated because I had a lady chairman in mind. I would ask for an additional 2 minutes.

Mr. HUTCHINSON. Without objection.

Ms. JACKSON LEE. I thank the Chairman for his kindness.

Mr. Devine.

Mr. DEVINE. Thank you. You asked how you would implement them, and the devil can be in the details.

Ms. JACKSON LEE. There you are, and I don't make you the devil. The local folk don't want to. I found you all very cooperative and I want to help you out even more.

Mr. DEVINE. I appreciate that.

Let me first say that our office and the U. S. Attorney's office in the northern district of Illinois have cooperated very well. The best example of that is the prosecution of Larry Hoover and several of the gangster disciples who ran major drug rings in Illinois. Two of the three prosecutors in that Federal case were assistant state's attorneys from Cook County, a number of police department members worked together, and we had a real team effort. So we had the will and the personalities to work together.

But we should start out with understanding the many human things that can happen, so I would suggest, Ms. Lee, that what we would look to do in Cook County is to establish if there is a Federal law, an understanding of what the possibilities are as far as a particular case. We would look at that case to determine what happened and what the maximum sentence is we can get under Federal or State law. But I believe if the local prosecutor, in this case Cook County, has a good law, has the opportunity to get as good a sentence as the Federal level can provide and is willing to prosecute and covers this area, it should be left to the local prosecutors. The prosecutor under this law could, if he or she sees fit, ask for assistance of the Federal Government and certainly if, for example, sexual orientation is not covered in the State law, that would be something that would automatically be reviewed by our friends on the Federal side. I think the more understanding there is of these different factors and how we would approach them, the better we will be able to avoid any conflicts and clashes. There will always be some but I think we can minimize them.

Mr. HUTCHINSON. Thank you.

At this time the Chair recognizes Mr. Conyers.

Mr. CONYERS. Thank you so much.

I don't want to shorten the time, Ms. Potter, that we may spend together, but I wanted to first of all thank you for including me in a favorable friendly context in your book.

Ms. POTTER. Oh, you are welcome.

Mr. CONYERS. My name leapt—that leapt to my attention right as I flipped through it. So that was very kind of you.

Now, is there any parts of this proposal we are studying today that could meet with your approval?

Ms. POTTER. Given that we already have section 245 and it covers race, color, religion, national origin and you have your interstate commerce nexus, if you—I think it may be wise to think about adding sexual orientation and gender to that. I don't think, however, that section 245 should be used as an all-purpose Federal hate crime statute. I think that the purpose of 245 was to be put to use in extraordinary circumstances and the way the bill reads now it includes a street mugging or altercation and I think that is something we can certainly trust State and local law enforcement to deal with properly.

Mr. CONYERS. If I could—well, I don't want to tip off all of my arguments when we meet again, but if I could prove to you that street muggings and run of the mill altercations are not caught by

this measure would you sleep more comfortably in your bed at night?

Ms. POTTER. I would, but the way I read the law it covers it, bodily harm, attempted bodily harm. It doesn't say serious bodily injury.

Mr. CONYERS. Right, but it goes all the way up to murder?

Ms. POTTER. Yes, but if you wanted to include just serious crimes or serious bodily injury you should write it into the law and not leave it open.

Mr. CONYERS. I am going to send you a few proposals, so when we have this coming together we will have something specific to talk about; it won't be just rehashing "he said, she said" and all that.

Thank you very much for your cooperation.

Ms. POTTER. Thank you.

Mr. CONYERS. Now, the problem, Professor Sunstein, that might come up if we add the commerce clause jurisdiction to paragraph 1 is we might be limiting the kind of cases to which it might apply, true?

Mr. SUNSTEIN. Absolutely.

Mr. CONYERS. So that is the trade-off for getting more constitutional assurance. We limit the range and scope.

Mr. SUNSTEIN. As I say, I think it is constitutionally acceptable as is. One alternative would be to redraft the bill just a little bit to make more precise what constitutional basis is being asserted for each provision. That is, I think Professor Harrison and I are agreed that section (c)(1) does not need a jurisdictional basis insofar as it is using the 13th amendment with respect to race. It does not raise that constitutional issue under the law as it now stands.

So it could be made quite specific where the commerce clause is being used. It is being used there also for (c)(1), and I think that is legitimate under existing law.

Mr. CONYERS. More or less inferred?

Mr. SUNSTEIN. It is not made clear by the findings and, as several people have spoken, it is as if the commerce clause is being asserted for (c)(2) only because that is the jurisdictional basis. But as the Violence Against Women Act was defended in court successfully on commerce clause, so too might (c)(1) here. The Violence Against Women Act has no jurisdictional basis.

The lower courts have said, nonetheless it is constitutionally acceptable under the affecting commerce rationale. So there would be ways to rewrite it to be specific, what basis is being asserted. As I say, then on its face it certainly would be upheld, would do almost all the work and maybe all the work you wanted to do.

Mr. CONYERS. My final plea to my chairman is to let Professor Harrison make any additional comments he wants to make to this same discussion.

Mr. HUTCHINSON. He looks very hungry.

Mr. HARRISON. I will be very brief because there are two things I do want to say. The first one is that I think it is an excellent idea for Congress to identify the power under which it is acting, especially here where the contours of the power are important, and for the committee to think about a question that has come up only a few times concerning its powers so far.

I think there is an undercurrent, which is the section 5 of the 14th amendment. We talked about the 13th amendment and the commerce power, but whether this can or should rest on section 5 is an independent question. But it is one that needs to be thought about independently.

The other thing I want to say is that the advice I was giving a while ago was a lawyer's advice about what is likely to happen in court. On that, yes, I think Professor Sunstein is probably the majority view and I am probably the minority view.

One reason that the courts are likely, if they are, the lower courts may be—they seem to be hitting differently from the Supreme Court on these questions—likely to uphold this under certain circumstances is because they are deferring to Congress. They are assuming, and they have been doing this since *McCulloch* v. *Maryland*, that these hard questions about the relationship between means and ends, about whether there is really an effect on commerce, about whether this is adopted because of its effect on commerce, these questions are decided here and not in the courts.

Mr. CONYERS. The Chairman is more hungry than you are, Professor Harrison, but you know the commerce clause is very liberally construed going all the way back to the New Deal.

Orange juice was found to be in commerce, so therefore jurisdiction attaches there. So it is sort of like the health and welfare and safety idea that just about anything you throw out there, at least in the older period of the court, might work.

So I want to thank you very much.

Mr. HUTCHINSON. Mr. Conyers, all time has expired. I am going to call an end to this hearing in just a moment. I know Ms. Jackson Lee has an additional question but the panel has been very tolerant and very cooperative. We kept them through lunch without a break, so I would like to conclude it.

Did you want to submit something for the record, Mr. Conyers?

Mr. CONYERS. I do have 5 pieces of testimony. I would like the record to stay open for a couple of days.

Could I just mention something that I can talk to them about afterward? I just want to name the cases. Charisse Tafilla, and its companion case, does that have any 13th amendment considerations?

[The information referred to follows:]

PREPARED STATEMENT OF KATHY RODGERS, EXECUTIVE DIRECTOR OF NOW LEGAL DEFENSE AND EDUCATION FUND

I am Kathy Rodgers, Executive Director of the NOW Legal Defense and Education Fund (NOW LDEF). NOW LDEF is the country's oldest national legal advocacy organization committed to protecting and advancing women's rights. We were established as a separate entity by the founders of the National Organization for Women over 28 years ago. Working to end violence in women's lives, including gender-based bias crimes, is at the heart of our mission. We chair the National Task Force on Violence Against Women that was instrumental in enacting the 1994 Violence Against Women Act ("VAWA") and have been litigating to help women enforce their rights under the VAWA Civil Rights Remedy.

I want to begin by thanking Chairman Hyde and Representative Conyers for the opportunity to submit this testimony in support of the Hate Crimes Prevention Act of 1997 ("HCPA"). Hate crime committed because of someone's race, color, religion, national origin, gender, sexual orientation or disability is an issue of grave importance to us all. Federal hate crime laws are critical because they provide uniform protection in every state from these systemic civil rights violations. HCPA would

amend 18 U.S.C. §245 ("Section 245"), the federal statute criminalizing certain bias crimes, to permit prosecution of bias crimes based on gender, sexual orientation or disability. This amendment is necessary in order to make real our national commitment to ending all forms of bias-motivated violence.

Bias crimes, including those committed against women, are attacks against the community as well as an individual. These crimes are not random, but are directed at women because they are women. Individual bias-motivated attacks instill fear in all women, threatening and restricting women's lives. They limit where women work, live and study. As a noted report on gender-based bias crimes by the Center for Women Policy Studies explains, "[w]omen—whether they are white or women of color, heterosexual or lesbian, old or young—know that they cannot go places men can go without the fear of being attacked and violated."[1] And, because of the great number of rapes and assaults by intimate partners, often they cannot go home, either.[2]

Why the amendment is needed

Adding gender to Section 245 provides a needed avenue of recourse for women who otherwise would be denied relief through the justice system. Instances unfortunately still occur in which state police or prosecutors fail to respond vigorously and thoroughly, leaving battered women and survivors of rape and sexual assault vulnerable to further violence and sometimes death. Currently, Section 245 permits federal prosecution of certain bias crimes committed because of the victim's race, color, religion, or national origin, but Federal prosecutors have no authority to prosecute bias crimes based on gender, sexual orientation or disability. HCPA would correct this.

Recent federal law begins to address the problem of gender-based hate crimes, including the criminal provision[3] and the civil rights remedy[4] enacted as part of the 1994 Violence Against Women Act ("VAWA"). But VAWA criminal remedies apply only in cases of interstate domestic violence or interstate violations of a protective order. Women surviving gender-based hate crimes that occur solely within one state still have no federal recourse for criminal enforcement even if their state law enforcement system has proven unable or unwilling to prosecute the case. And, while the VAWA civil rights remedy represents a major legal advance, it is not a substitute for criminal prosecution in the aftermath of a violent crime.[5]

The following are a few examples of gender-based bias crimes for which federal authority under Section 245 might provide criminal redress:

- A woman was battered by her husband for many years. He had battered his former wife and former girlfriends as well. He refused to allow his wife to work, stating that women belong in the home and that he wouldn't tolerate his wife working. She went to the police on numerous occasions, but they responded in only a perfunctory way because they were good friends with her husband. They repeatedly declined to arrest him even when she called the police after he violated the restraining orders she had obtained.

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[1] Center for Women Policy Studies, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues* 2 (1991).

[2] A recent Department of Justice Study revealed that women are five to eight times more likely than males to be victimized by an intimate. Lawrence A. Greenfield, et. al., U.S. Department of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 4 (March 1998).

[3] *See* 18 U.S.C. §§ 2261, 2262 (1997).

[4] *See* 42 U.S.C. § 13981 (1997).

[5] Adding gender to Section 245 is consistent with the United States' obligations as a signatory to the International Covenant on Civil and Political Rights ("ICCPR"), to provide broad protection against gender-based violence. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Treaty Doc. No. 95–2, 999 U.N.T.S. 171 (ratified by United States on June 8, 1992) (creating protections through guaranteeing freedom of liberty and security of person, the right to be free from torture or cruel, inhuman or degrading treatment and equal and effective protection against discrimination, *inter alia*, on the basis of sex). International human rights standards have adopted that customary norm under which gender-based violence is recognized as an impermissible form of discrimination for which all countries are obligated to provide remedies. *See, e.g., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at General Recommendation 19, p. 112 U.N. Doc. HRI/GEN/1/Rev.2 (29 March 1996) (referencing United Nations Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW")); Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, *opened for signature* 9 June 1994, 3 IHRR 232 (adopted by acclamation of the General Assembly of the Organization of American States).

- A serial rapist was accused of raping several women. The crimes were characterized by extreme violence and mutilation of the women's genitals. He fled the state once he learned the local police had identified him as a suspect.
- A woman alleged that she was gang raped by several men who uttered gender-based epithets such as "bitch" and "whore" as they raped her. They apparently were in town visiting a friend. Local law enforcement officials said they could not prosecute them because they lived out of state.
- A woman was sexually assaulted by another passenger while she was riding on a train from Florida to New York. During the assault, he berated her, told her that she was getting what she deserved for traveling alone as a woman, and that should be at home raising her children. She had no idea which state the train was passing through at the time of the assault. The Florida and New York police apologetically said they could not prosecute as a result.
- In a brutal gang rape case pending under the Violence Against Women Act civil rights provision, two male students allegedly repeatedly raped a female student. One of the perpetrators latter bragged that he liked to get women drunk and sexually assault them.

While most gender-based bias crimes should continue to be prosecuted at the state level, and while resources should continue to be directed to improving the formal and informal responses of local law enforcement officials, federal criminal intervention still may be required in appropriate cases, such as those described above.

Determining gender-motivation

Assessing when acts of violence against women are gender-motivated is not a novel inquiry, particularly for federal courts. If Section 245 is amended to include gender, prosecutors and courts evaluating criminal bias crime allegations can employ the same analysis used in other civil rights and discrimination cases to determine whether a particular violent act was committed because of the victim's gender.

Courts already assess whether violent acts were gender-motivated in other contexts. For example, a series of discriminatory epithets combined with evidence of discriminatory views about women led one court to recognize a gender-based conspiracy by anti-abortion protestors that violated 42 U.S.C. §1985(3) ("Section 1985(3)"), the federal statute prohibiting conspiracies to violate an individual's civil rights.[6] A few other courts have recognized that sexual harassment and discrimination at work could reflect gender-motivated conspiracies that also violate Section 1985(3).[7] Courts also have begun to recognize that sexual assaults and domestic violence may be forms of gender-motivated violence that violate the Civil Rights Remedy of the 1994 Violence Against Women Act.[8]

Similarly, in evaluating sexual harassment claims brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), courts routinely analyze the totality of the circumstances to assess whether the offensive conduct was committed because of the victim's gender.[9] Applying that test to allegations of workplace sexual harassment, courts have found certain conduct to be indicative of gender motivation. That conduct includes: repeated lewd or sexually suggestive comments; [10] derogatory epithets

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[6] *See Libertad* v. *Welch*, 53 F.3d 428, 449 (1st Cir. 1995).

[7] *See, e.g., Saville* v. *Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1537–40 (M.D. Ala. 1994); *Larson* v. *School Bd. of Pinellas County*, 820 F. Supp. 596, 602 (M.D. Fla. 1993).

[8] *See, e.g., Brzonkala* v. *Virginia Polytechnic*, 132 F. 3d 949 (4th Cir.1997), *rev'g* 935 F. Supp. 779 (W.D. Va. 1996), *reh'g en banc granted* (4th Cir. Feb. 5, 1998) (gang rape with comments evincing gender-bias); *Mattison* v. *Click Corp.*, No. 97–CV–2736, 1998 U.S. Dist. LEXIS 720, at *23 (E.D. Pa. Jan. 27, 1998) (sexual assault, sexual harassment and battering by supervisor); *Doe* v. *Hartz*, 970 F. Supp. 1375, 1406–08 (N.D. Iowa 1997), *rev'd on other grounds*, No. 9703986, 1998 U.S. App. LEXIS 1918 (8th Cir. Jan. 26, 1998) (allegations of sexual assault or sexual exploitation by priest); *Crisonino* v. *New York City Housing Auth.*, No. 96 Civ. 9742 (HB), 1997 U.S. Dist. LEXIS 18268, at *15 (S.D.N.Y. Nov. 18, 1997) (gender-biased comment and assault by supervisor); *Anisimov* v. *Lake*, No. 97 C 263, 1997 U.S. Dist. LEXIS 12995, at *33 (N.D. Ill. Aug. 27, 1997) (inappropriate sexual advances, including fondling, attempting to remove clothing, grabbing breasts, assault and rape by boss); *cf. McCann* v. *Rosquist*, No. 2:97–CV–0535–S, 1998 U.S. Dist. LEXIS 3685 (D. Utah Mar. 19, 1998) (stating that sexual assault and harassment by boss were gender-motivated while rejecting claims on other grounds).

[9] *See, e.g., Oncale* v. *Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998); *Harris* v. *Forklift Sys., Inc.*, 114 S. Ct. 367 (1993); *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986).

[10] *See EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1514–15 (9th Cir. 1989) (sexual remarks, vulgarities, requests for sexual favors and disparaging comments about pregnancy created a hostile environment); *Bundy* v. *Jackson*, 641 F.2d 934, 944–45 (D.C. Cir. 1982) (sexually stereotyped insults and demeaning propositions created a hostile environment).

or nicknames;[11] display of pornographic pictures that was part of a pattern of harassment;[12] comments reflecting negative and stereotypical views of women;[13] or patterns of similar conduct toward other women.[14] Looking at the totality of the circumstances, courts analyzing workplace sexual harassment cases specifically have concluded that rapes or sexual assaults at work may reflect sufficient gender-motivation to create a hostile environment.[15] Applying the same type of analysis, courts could analyze whether rapes or sexual assaults reflected gender-motivation under HCPA.

Bias crimes based on race, color, religion or national origin that have been prosecuted under Section 245 and under Section 1985(3) also show that federal courts readily analyze the circumstances surrounding violent incidents to determine whether they were motivated by bias. Courts have relied on evidence similar to that cited in the cases described above: racial slurs or epithets;[16] derogatory comments about members of a particular race made in connection with the violent incident;[17] prior acts and statements reflecting racial animosity;[18] prior acts of violence committed against the members of a protected group;[19] and membership in a group espousing racially biased views.[20] Undoubtedly, courts can analyze similar types of evidence to determine whether and when violent crimes committed against women were gender-motivated.

While violence against women undeniably is a pervasive problem of epidemic proportions, not all violent crimes against women would be subject to federal prosecution under Section 245, just as not all crimes committed against racial, religious or sexual minorities constitute bias crimes.[21] Generally-accepted guidelines for identifying bias crimes direct courts to look at a range of factors, including language, severity of the attack, absence of another apparent motive, patterns of behavior, and "common sense."[22] Congress recognized the applicability of those guidelines to gender-motivated crimes when it enacted the 1994 VAWA.[23] Drawing from these guidelines, prosecutors and courts can evaluate the totality of the circumstances in gender-based bias crime allegations to determine which cases contain sufficient evi-

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[11] *See, e.g., Caff* v. *Alison Turbine*, 32 F.3d 1007, 1009 (7th Cir. 1994) (derogatory sexual remarks, sexual epithets, playing sex- or gender-related "pranks" contributed to hostile environment); *EEOC* v. *A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 34 (W.D.N.Y. 1994) (evidence included company vice-president's repeated references to female co-worker as a "whore").

[12] *See, e.g., Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3rd Cir. 1990).

[13] *See, e.g., Harris*, 114 U.S. at 369 ("you're a woman, what do you know?"); *cf. Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 235–36, 288 (1989) (sex discrimination case in which woman was charged with being "overly aggressive, unduly harsh," "macho" and directed to go to charm school because "it's a lady using foul language").

[14] See, e.g., Paroline v. *Unisys Corp.*, 879 F.2d 100, 103 (1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (several female clerical workers subjected to pattern of sexually suggestive remarks and unwelcome touching).

[15] *See, e.g., Brock* v. *United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) ("every rape committed in the employment setting is also discrimination based on the employee's sex"); *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) ("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment"); *Yaba* v. *Roosevelt*, 961 F. Supp. 611, 620 (S.D.N.Y. 1997) (sexual assault and harassment by law firm partner created a hostile work environment); *Al-Dabbagh* v. *Greenpeace. Inc.*, 873 F. Supp. 1105, 1110–11 (N.D. Ill. 1994) (pattern of sexual assaults at work created a hostile environment).

[16] *See, e.g., United States* v. *Makowski*, 120 F. 3d 1078, 1080 (9th Cir. 1997); *United States* v. *Dunnaway*, 88 F.3d 617, 618 (8th Cir. 1996); *Usher* v. *City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *Fisher* v. *Shamburg*, 624 F.2d 156, 158 (10th Cir. 1980); *Lac Du Flambeau* v. *Stop Treaty Abuse*, 843 F. Supp. 1284, 1292–93 (W.D. Wis.), *aff'd*, 41 F.3d 1190 (7th Cir. 1994), *cert. denied*, 514 U.S. 1096 (1995); *Hawk* v. *Perillo*, 642 F. Supp. 380, 392 (N.D. Ill. 1985).

[17] *See, e.g., Griffin* v. *Breckenridge*, 403 U.S. 88, 103 (1971); *Makowski*, 120 F.3d at 1080; *United States* v. *Bledsoe*, 728 F.2d 1094, 1095 (8th Cir. 1984); *United States* v. *Franklin*, 704 F.2d 1183, 1186 (10th Cir. 1983); *Johnson* v. *Smith*, 878 F. Supp. 1150, 1155 (N.D. Ill. 1995).

[18] *See, e.g., United States* v. *Woodlee*, 136 F.3d 1399, 1410 (10th Cir. 1998); *United States* v. *Dunnaway*, 88 F.3d 617, 618 (8th Cir. 1996); *United States* v. *Lane*, 883 F.2d 1484, 1496 (10th Cir. 1989).

[19] *See, e.g., United States* v. *Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984); *United States* v. *Franklin*, 704 F.3d 1183, 1187 (10th Cir. 1983).

[20] See, e.g., United States v. *Dunnaway*, 88 F.3d 617, 618 (8th Cir. 1996).

[21] *See generally*, Anti-Defamation League, *Hate Crimes Law* 2–3 (1997); *Northwest* Women's Law Center *et al.*, *Gender Bias Crimes: A Legislative Resource Manual* 12–14 (1994).

[22] *See* U.S. Dep't of Justice, Federal Bureau of Investigation, *Hate Crime Data Collection Guidelines* 1–4; Center for Women Policy Studies, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues* 8–12 (1991).

[23] *See* S. Rep. No. 103–138, at 53 n.61 (1993) ("1993 Senate Report").

dence that the crimes were committed because of the victim's gender, and therefore, are subject to federal prosecution.[24]

Federal action is needed to respond to limitations in state law enforcement

As discussed above, federal intervention will be required principally in cases of gender-motivated crimes in which state law enforcement systems either could not or would not prosecute. Unfortunately, state law enforcement's persistent failure to adequately recognize and address gender-motivated crimes poses substantial, and sometimes life-threatening obstacles for women.[25] The 1994 VAWA took the first steps in ameliorating the problem of formal and informal failings of state laws.[26] But reports of state task forces looking at gender bias, issued since VAWA's passage, reveal that these problems remain entrenched. For example, the 1996 report of the North Dakota Commission on Gender Fairness in the Courts indicates that women still are subjected to victim blaming, trivialization and stereotyped views of their credibility in criminal and civil domestic violence proceedings.[27] In one instance, a judge informed a battered woman seeking a protective order that she would one day realize that it was all "her fault."[28] A member of the Minnesota Supreme Court Gender Fairness Implementation Committee in 1997 reported that domestic assaults persistently are plea bargained down to disorderly conduct offenses and that the state law requiring presentence investigations in domestic assault situations is consistently ignored.[29] She similarly noted that judges fail to apply appropriate sanctions for failures to comply with probation or treatment requirements in domestic violence cases.[30]

The need for federal jurisdiction as a remedy to states' failed responses to gender-based crimes starkly echoes the impetus for the passage of 18 U.S.C. §245 in 1968. At that time, state criminal laws purportedly provided protection from bias-related violent crimes, but it became increasingly apparent that those laws were being unevenly enforced with respect to race. Those who enacted Section 245 recognized that "[u]nder the Federal system, the keeping of the peace is, for the most part, a matter of local and not Federal concern."[31] Yet, unchecked violence against African-Americans led Congress to enact a federal remedy. According to the Senate Report,

> [L]ocal officials have either been unable or unwilling to solve and prosecute crimes of racial violence or to obtain convictions in such cases—even where the facts seem to warrant. As a result, there is need for Federal action to compensate for the lack of effective protection and prosecution on the local level.[32]

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[24] As an additional safeguard to ensure that federal resources are only invoked in appropriate cases, the existing requirement that federal prosecutions may only be undertaken after the Attorney General certifies that federal prosecution is "in the public interest and necessary to secure substantial justice," would apply to prosecution of gender-based bias crimes as well. *See* 18 U.S.C. §245(a)(1).

[25] For example, in enacting VAWA, Congress cited study after study concluding that crimes disproportionately affecting women are treated less seriously than comparable crimes affecting men. *See, e.g.*, 1993 Senate Report, at 49; (citing studies of state gender-bias task forces); 1991 Senate Report, at 46–47, 49. Congress also recognized that police, prosecutors, juries and judges routinely subject female victims of rape and sexual assault as well as domestic violence to unfair and degrading treatment that contributes to the low rates of reporting and conviction that characterize these crimes. *See, e.g., 1993 Response to Rape* at 2–6; *accord Violence Against Women: Hearing Before the subcomm. On Crime and Criminal Justice of the House Comm. On the Judiciary*, 102d Cong. 63, at 75 (1992) (*"1992 Violence Against Women Hearing"*); (statement of Margaret Rosenbaum, Assistant State Attorney and Division Chief, Domestic Crimes Unit, Miami, Florida) (recognizing that police officers persist in failing to treat domestic violence as a "real crime"); 1991 Senate Report, at 39; *Violence Against Women: Hearing Before the subcomm. On Crime and Criminal Justice of House Comm. On the Judiciary*, 102d Cong. 63, at 75 (1992) (*"1992 Violence Against Women Hearing"*); *Women and Violence: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 29–30 (1990) (statement of Marla Hanson).

[26] For VAWA's legislative history documenting Congress' recognition of state judicial systems' long histories of treating gender-based crimes less seriously than other crimes warranted federal intervention, *see, e.g.*, 1993 Senate Report, at 42. *See also* Staff of Senate Comm. on the Judiciary, 103d Cong., *The Response to Rape: Detours on the Road to Equal Justice* 1–2 (Comm. Print 1993) (*"1993 Response to Rape"*); S. Rep. No. 102–197, at 43–48 (1991) ("1991 Senate Report").

[27] *A Difference in Perceptions: The Final Report of the North Dakota Comm'n on Gender Fairness in the Courts*, 72 N.D. L. Rev. 1113, 1208–12 (1996).

[28] *Id.* at 1208.

[29] Letter from Judge Mary Klas to National Assoc. of Women Judges (Aug. 26, 1997) (on file with NOW LDEF).

[30] *Id.* at 2. *See also* Alaska Joint State-Federal Courts Gender Equality Task Force, *Final Report* 22, 44 (April 1996) (recognizing prevalence of gender bias and tendency of magistrates and judges to rely on subjective factors rather than evidence when deciding whether to issue domestic violence protective orders).

[31] S. Rep. No. 90–721, *reprinted* in 1968 U.S.C.C.A.N. 1837, 1839.

[32] *Id., reprinted* in 1968 U.S.C.C.A.N. 1840.

States' uneven responses to gender-based violent crimes similarly supports amending Section 245 today to permit federal prosecution.

An extensive body of case law confirms that time and again violence, injury and death might have been prevented but for the neglect, inaction, bias or complicity of local police and police department policies. Appropriate federal intervention would have saved lives.[33]

Adding gender to 18 U.S.C § 245 is constitutional

Adding gender to the protected groups against whom bias crimes may be prosecuted is well grounded in Congress' constitutional authority. Courts have upheld Section 245 as a valid exercise of Congress' power under the Commerce Clause, the Thirteenth Amendment and Section 5 of the Fourteenth Amendment powers.[34] Since it regulates conduct and not speech, it implicates no first amendment rights.[35]

Most important, since any gender-based prosecutions would require proof that the offense had some impact on or was committed in connection with any activity involved in or affecting interstate commerce, there can be no doubt that HCPA firmly is grounded in Congress' Commerce Clause powers.[36] Courts have upheld analogous criminal provisions of the 1994 Violence Against Women Act against constitutional challenges, finding them within Congress' Commerce clause powers because both felonies contain a jurisdictional requirement.[37] Courts have upheld other similar federal criminal statutes.[38] Moreover, HCPA poses none of the federalism concerns that concerned the Supreme Court in *Lopez*,[39] because civil rights enforcement is an area of traditional federal jurisdiction.[40]

Conclusion

The failures of state law enforcement systems, and women's continued subjugation to gender-motivated bias crimes, provide compelling justification to amend Sec-

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[33] *See, e.g., Soto* v. *Flores*, 103 F.3d 1056 (1st Cir. 1997) (batterer killed his two children and then himself after police, who were his friends, refused to arrest him despite mandatory arrest law), *cert. denied*, 118 S. Ct. 71 (1997); *Navarro* v. *Block*, 72 F.3d 712 (9th Cir. 1995) (batterer killed his wife and four others after police refused to respond to her call for help, even though she told dispatcher about restraining order and that he was headed to house to kill her); *Pinder* v. *Johnson*, 54 F.3d 1169 (4th Cir. 1995) (batterer burned former girlfriend's house, killing her three children, following battering incident, after which policy assured her that he would be held in jail overnight but released him instead); *accord Eagleston v.* Guido, 41 F.3d 865 (2d Cir. 1994); *Ricketts* v. *City of Columbia*, 36 F.3d 775 (8th Cir. 1994); *Brown* v. *Grabowski*, 922 F.2d 1097 (3d Cir. 1990); *Raucci* v. *Town of Rotterdam*, 902 F.2d 1050 (2d Cir. 1990); *Balistreri* v. *Pacifica Police Department*, 901 F.2d 696 (9th Cir. 1988); *McKee* v. *City of Rockwell*, 877 F.2d 409 (5th Cir. 1989); *Watson* v. *City of Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Smith* v. City of Elyria, 857 F. Supp. 1203 (N.D. Ohio 1994).

[34] See, e.g., United States v. *Lane*, 883 F.2d 1484 (10th Cir. 1989) (Commerce Clause); *United States* v. *Bledsoe*, 728 F.2d 1094 (8th Cir. 1984) (13th and 14th Amendments).

[35] The Supreme Court has upheld against first amendment-based challenges the constitutionality of bias-crime statutes that regulate conduct and not speech. *See Wisconsin* v. *Mitchell*, 508 U.S. 476, 487–90 (1993).

[36] Congress' Commerce.Clause powers include the authority to regulate the channels of interstate commerce. *See, e.g., United States* v. *Lopez*, 514 U.S. 549, 558 (1995). The Supreme Court has upheld the constitutionality of statutes like HCPA, which require the crossing of a state line, because they regulate conduct that squarely is in interstate commerce. *See id.* at 562 (noting that jurisdictional element would ensure an otherwise-ambiguous statute's connection with interstate commerce); *Cleveland* v. *United States*, 329 U.S. 14 (1946) (upholding Mann Act, which regulates regulating interstate transport of a woman or girl for immoral purposes); *Caminetti* v. *United States*, 242 U.S. 470 (1917) (upholding White Slave Traffic Act, which regulates interstate transport of another for purposes of debauchery).

[37] Both federal felonies enacted as part of the 1994 VAWA, 18 U.S.C. § 2261, criminalizing interstate domestic violence, and 18 U.S.C. § 2262, criminalizing interstate violation of a protection order, contain a jurisdictional requirement requiring the crossing of a state line. Courts uniformly have upheld these statutes as constitutional under the Commerce Clause. *See, e.g., United States* v. *Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998) (18 U.S.C. § 2262(a)(1)); *United States* v. *Page*, 136 F.3d 481, 487 (6th Cir.) (18 U.S.C. § 2261(a)(2)), *vacated pending hearing en banc*, ___ F.3d ___, 1998 WL 273589 (6th Cir., May 21, 1998); *United States* v. *Wright*, 128 F.3d 1279, 1275 (8th Cir. 1997) (18 U.S.C. § 2262(a)(1)); *United States* v. *Bailey*, 112 F.3d 758, ___ (4th Cir.) (18 U.S.C. § 2261(a)), *cert. denied*, 118 S. Ct. 240 (1997). HCPA's jurisdictional requirement is somewhat different in that it requires some link with commerce rather than the crossing of a state line, but should be held constitutional under similar reasoning.

[38] See, e.g., United States v. *Cobb*, No. 96–4969, 1998 WL 246141, at **1–3 (4th Cir. May 18, 1998) (federal car jacking statute); *United States* v. *Wells*, 98 F.3d 808, 810–11 (4th Cir. 1996) (federal firearms statute); *United States* v. *Robinson*, 119 F.3d 1205, 1213 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1104 (1998) (Hobbs Act, which criminalizes interstate robbery or extortion); *United States* v. *Corona*, 108 F.3d 565, 570–71 (5th Cir. 1997) (federal arson statute).

[39] *See, e.g.*, 514 U.S. at 567.

[40] *See, e.g., City of Riverside* v. *Rivera*, 477 U.S. 561, 575 (1986) (noting "highest importance" of vindicating civil rights violations).

tion 245 to include gender in the protected categories. Existing case law and standards for federal prosecution of other bias crimes show that discerning which of the violent crimes committed against women are committed because of the victims' gender is not a novel, unique, or overwhelming inquiry, but draws on analytical tools familiar to federal courts in similar contexts. Including gender in Section 245 will provide redress to women currently denied access to criminal justice and will substantially advance our country's efforts to fight this devastating epidemic of violence against women.

PREPARED STATEMENT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION

The American Psychological Association, a scientific organization of more than 155,000 researchers, educators, and clinicians, is pleased to submit testimony to the House Judiciary Committee on hate crimes. Our members have produced a vast amount of research examining antecedents, causes, and consequences of violent behavior.

To summarize this research, we can conclude that violence is not random, uncontrollable, or inevitable. Many factors, both individual and social, contribute to an individual's propensity to use violence and are within our power to change. The APA has a long history of providing testimony and witnesses to Congress outlining this point, with an emphasis on early intervention programs for the prevention of youth violence. *An issue of specific concern and the focus of this testimony today, is the increased need to address violence motivated out of hate and prejudice.*

Important societal factors that contribute to a unique type of violence are prejudice, intolerance, and discrimination. Negative attitudes towards certain groups are demonstrated in daily acts of interpersonal behavior and in their extreme manifestation can be expressed through hate crimes.

Although hate violence research is only in its early stages of study, we have begun to answer some important questions.

WHY WE NEED LEGISLATION ON HATE CRIMES

Prevalence

According to community surveys, violence against individuals on the basis of their real or perceived race, ethnicity, religion, sexual orientation, gender, disability, or other social groupings is a fact of life in the United States. For example, one study documenting the prevalence of hate crimes among more than 2000 lesbians, gay men, and bisexuals found that one in four men and one in five women had experienced a hate crime since the age of 16. The types of victimization included assaults, rapes, robberies, thefts, and vandalism.

The Psychological Impact

- A crime is not simply a crime. Social science research has found that the experience of a serious hate crime has more severe psychological ramifications for the victim than a random crime of similar severity (Herek, Gillis, Cogan & Glunt, 1997; Herek, Gillis, Cogan, in press). According to this research victims of hate crimes had higher levels of depression, stress, and anger than victims of a random crime. The negative effects of hate crimes are longer lasting than those of other crimes. Hate crime victims continued to have higher levels of depression, stress, and anger for as long as five years after their victimization. In contrast, crime-related psychological problems dropped substantially among survivors of non-bias crimes within approximately two years after the crime.

The Potential Economic Impact

The increased enduring psychological stress of experiencing a hate crime may lead to:

- *Increased financial costs for the victims*
  - — People are more likely to seek out mental health services and other forms of assistance after a traumatic event and during periods of great distress. Therefore, in addition to their increased psychological stress as a result of the hate crime experience, victims may incur increased financial burdens.
  - — Psychological health is often associated with physical health, thus victims may experience more somatic problems resulting in increased use of physical health care services. This will either put a financial burden on the victim or the employer depending upon who is responsible for health care costs.

- *Increased costs to employers.* According to some social science research, certain types of hate crimes most commonly occur in public places, such as the workplace and schools (Franklin, 1997). Hate crimes occurring in these environments may threaten the victim's sense of safety in the workplace and schools and in turn may effect work and school performance resulting in lower performance and greater absenteeism. Additionally morale of all employees may be negatively impacted.
- *Loss of financial revenue for businesses.* People who are depressed tend to isolate themselves socially and not interact with others, thus victims of hate crimes who experience depression may be less likely to frequent commercial establishments such as restaurants and stores and less likely to spend money at these establishments.

The Potential Social Impact

- Hate crimes are not only an attack on the individual but also an attack on that individual's community. Hate crimes serve to threaten and intimidate entire communities. This fear may result in an increased sense of vulnerability among community members. This heightened sense of fear plays a role in hate crimes reporting. According to one study, more severe forms of hate crimes were less likely to be reported to the police, and the researchers concluded that this lack of reporting is in part due to the victim's fear that the perpetrators will seek revenge (Dunbar, 1997).
- Research shows that hate crimes are less likely to be reported to the police than random crimes and are greatly underreported (Dunbar, 1997). According to one study, only a third of hate crimes were reported to the police compared to more than half of non-bias crimes (Herek, Gillis, & Cogan, in press). One of the reasons for this lack of reporting may be a perception or concern that police agencies are biased against the group to which the victim belongs, and police authorities will not be responsive to the incident.

Therefore, hate crime legislation that expands the jurisdiction and resources for appropriate prosecution is essential. The American Psychological Association supports the *Hate Crimes Prevention Act* and urges the Committee to vote it out of Committee and take a leadership role on the Senate floor.

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PREPARED STATEMENT OF BRIAN LEVIN, DIRECTOR, CENTER ON HATE & EXTREMISM, RICHARD STOCKTON COLLEGE

HEARING BEFORE THE HOUSE JUDICIARY COMMITTEE, JULY 22, 1998, WASHINGTON, DC

My name is Brian Levin and I am Director of the Center on Hate & Extremism at the Richard Stockton College of New Jersey, where I am also an Associate Professor of Criminal Justice. The Center conducts sophisticated research in the area of hate crime and domestic terrorism and provides this information to law enforcement agencies, legislatures, civil rights organizations, the media and educators. I want to thank the Committee on the Judiciary for the opportunity to render this testimony in support of H.R. 3081, the Hate Crime Prevention Act of 1997 (HCPA) sponsored by Congressman Charles Schumer of New York.

I have extensively researched the issue of hate crime over the last 12 years in my current position.as well as in my previous positions as Associate Director of Legal Affairs of the Southern Poverty Law Center's Klanwatch and Militia Task Force

Projects and Legal Director of the Center for the Study of Ethnic & Racial Violence. Four years ago this month I testified before Congress to ask this body to reform 18 U.S.C. §245 by expanding both the rights protected and the groups covered by the law. I come to Washington today, to again reiterate and update my previous request. Since the record of those hearings were never formally published I have included my prior testimony in the appendicies of this statement for inclusion in the record.

CRIMINOLOGICAL SEVERITY OF HATE CRIME

Two things have become readily apparent to me during my years of work in the field. The first finding is that from a criminological standpoint hate crimes are far more prevalent and dangerous than previously thought. A study I conducted several years ago indicated that a discriminatory "hate" crime occurs in this nation once every 14 minutes. The second is that a hodgepodge of criminal laws at the state and federal level leave many innocent Americans without adequate protection.

STATUS & INADEQUACY OF PRESENT LAW

The laws of about 45 states and several federal criminal statutes are applicable to hate crimes under certain limited circumstances. The Supreme Court has consistently upheld these types of state and federal civil rights laws. See Wisconsin v. Mitchell, 508 U.S. 476 (1993) (Court upholds state hate crime penalty enhancement law.); United States v. Price, 383 U.S. 787 (1966) (Court affirms broad application of criminal civil rights conspiracy law); Screws v. United States, 325 U.S. 91 (1945) (Court affirms conviction of policeman under 18 U.S.C §242 for killing an African-American).

Still enforcement is spotty, even among those states that have enacted laws. In a typical year Boston, with a population of 500,000, counts more hate crime cases than Georgia, Tennessee, Alabama, Arkansas, Louisiana, South Carolina, and Mississippi combined.

Furthermore, the applicability of these laws is limited by two basic elements. The first required element relates to the type of victim group that is protected such as race or religion. The next element relates to the type of activity of the victim that is protected or the type of criminal conduct of the offender that is proscribed. For instance 18 U.S.C. §245 only addresses the violation of a specifically enumerated right such as voting or employment. Some state laws only enhance certain types of criminal conduct such as assaults and vandalisms but not other offenses motivated by hate.

While nearly all state hate crime laws punish discriminatory crimes based on race, religion, and ethnicity only about half the states protect on the basis of gender and disability. About twenty states protect on the basis of sexual orientation. Moreover, there is no broadly applicable federal hate crime law, and existing federal criminal civil rights

They also subscribe to a strategy called leaderless resistance, popularized in the Neo-Nazi tact, *The Turner Diaries* and by former Ku Klux Klansman Louis Beam. Leaderless resistance encourages random acts of violence, not just on public activists, but on all minorities, by either lone assailants or small tightly knit cells. This obviously makes it harder to apply the more open-ended federal civil rights conspiracy law, 18 U.S.C. §241. One of the alleged assailants of James Byrd is reported to have proclaimed that he murdered his victim to start the race war depicted in the Turner Diaries "early".

Many are also influenced by Christian Identity, the racist religion of white supremacy, which preaches that Jews are the spawn of Satan and African-Americans subhuman. But bigoted extremists now include others on their list of evildoers. Feminists, gays, and the disabled have no place in their vision of a perfect Aryan society. One ex-Aryan Nations official confided to me that after the nation was rid of blacks, Jews, progressives, the disabled were next on their list.

Clearly, today's violent bigots have expanded their list of targets to include a whole range of individuals beyond just Blacks and Jews. Unfortunately, this message of hate has gained currency not just among extremists, but in the mainstream as well, where it is often galvanized by portrayals in the media. These negative and dehumanizing stereotypes then fuel other hate attacks from less ideological offenders—ranging from thrill seeking young people trying to gain validation from their peers to disenfranchised adult loners. For example, gay Americans, who are increasingly singled out by the extremist community, face a significant risk of attack from a vast spectrum of assailants ranging from terrorist bombers to skinheads to roving bands of armed high school students. Last year, for example, the National Coalition of Anti-Violence Programs identified 1081 criminal anti-gay assaultive offenses. An astounding 22 percent of these then that constitutes a violation of federal law . . .

[b]ut it is my considered judgment that this type of violence can take place without running afoul of federal statutes."

EXPANDING GROUP COVERAGE

Expanding protection of the criminal civil rights law to gays and lesbians, women and the disabled is thoroughly consistent with the aims of hate crime law generally. Hate crimes do not express "hatred" per se and these laws do not punish expressions of abstract bigotry—which are constitutionally protected. Hate crimes really are the discriminatory use of violence to enforce a particular social hierarchy—one where the roles and status of victims and their groups are degraded and threatened. This discriminatory violence is not worse merely because victims face a heightened risk of injuries and future attacks. These crimes are also worse because they threaten whole groups of people from meaningful participation in our society because of who they are. Thus, they our crimes against our national community.

Expanding the groups that are protected by 18 U.S.C. § 245 is thoroughly within the constitutional authority of Congress. The Supreme Court has consistently held that the gender category is subject to a heightened level of scrutiny in the area of discrimination. Frontiero v. Richardson, 411 U.S. 677 (1973).

A heightened scrutiny showing though, is far from the only reason we can punish these atrocities. Congress has additional authority to punish discriminatory violence on the basis of disability and sexual orientation because:

1. States often fail to provide protections for these groups;
2. Victimizations are frequent;
3. There is no rational basis for the law to sanction such crimes under the equal protection clause of the Fourteenth Amendment. See Cleburne v. do so would irrationally preclude the recent murder of James Byrd as a hate crime merely because he knew one of his alleged assailants.

According to the FBI gays and lesbians account for about 12 percent of the hate crimes committed every year and recent studies establish that they face a high risk of criminal victimization merely because they are perceived to be gay or lesbian. Many anti-gay hate crimes involve bands of roving assailants hunting down random "gay looking" victims with weapons such as tire irons, baseball bats and bricks. Some mistakenly—contend that punishing violent thugs who brutalize gays promotes homosexuality. Yet, no one has seriously argued that anti-church arson laws impermissibly promote religion, or laws against involuntary servitude encourage illegal immigration.

CONCLUSION

Most hate crime violations are prosecuted at the state level and we have no desire to "federalize" an unlimited array of crime. Federal prosecutors only intervene in those cases of overriding national concern or where local enforcement is highly flawed. We expect this to continue. In 1997 for example, federal authorities prosecuted only 21 racial violence cases involving 43 defendants. We do not believe these reforms will result in a deluge of new cases.

Still these reforms, if passed, are not self executing. The FBI has less than 200 agents nationwide to deal with these atrocities- and hate crime is only part of their docket. We need to increase the staffing and budgets not only for the FBI divisions that study and arrest assailants, but for the Community Relations Service which mediates intergroup disputes, the Federal Law Enforcement Training Center's Hate/Bias instructional program, and the Justice Department's Civil Rights Division.

From Los Angeles Daily Journal: 1994

Stamping Out Hate Crimes

The Need for a Comprehensive Federal Statute

By Brian Levin

The recent changes in Congress have focused renewed attention on the federal response to crime. An area overdue for reform involves those federal statutes addressing violent deprivations of civil rights.

Simply put, the federal government's ability to punish violent deprivations of civil rights is severely limited by antiquated laws. These laws are replete with loopholes that result in miscarriages of justice in some of the nation's most notorious civil rights cases.

Consider the following examples:

■ Federal authorities were unable to secure a conviction against a white supremacist who critically injured a prominent African American leader because they could not establish that the shooter had intended to interfere with the victim's right to stay at a particular hotel — a requirement of the applicable civil rights law.

■ Civil rights charges against two Panama Mena-based U.S. Customs officers who kidnapped, robbed and murdered a Dominican money courier were dismissed because the victim, a visitor, was not subject to prosecution under the civil rights laws because he was not an inhabitant of the United States who is subject to protection.

■ Lesbians running Camp Sister Spirit, a community service and educational retreat in Mississippi face ongoing terrorism which includes threats, harassment, shootings and the placement of a dead dog over their mailbox. Because there is no applicable federal criminal law or civil injunctive remedy, the threats continue. The women remain in fear because the local authorities' commitment to their protection is questionable. Moreover, the two main federal agencies that mediate and perform fact-finding regarding intergroup disputes — the Justice Department's Community Relations Service and the U.S. Commission on Civil Rights — do not address issues relating to sexual orientation.

■ Federal prosecutors decided not to prosecute another federal civil rights case: a racist California gang whose members had conspired to bomb an African American church and assassinate members of minority communities. The reasons? The difficulty in prosecuting cases under the current federal civil rights statutes. Instead, prosecutors chose to charge the defendant skinhead with weapons and explosives violations.

Although unredressed, these and other criminal violations of civil rights violations remain a serious problem in the United States. The FBI reports that over 7,600 hate crime incidents were recorded during 1993. Klanwatch reported that bias-based vandalism incidents increased 36 percent from 1992 to 1993. The Anti-Defamation League noted that anti-Semitic incidents increased 5 percent in the same period, with a 23 percent increase in incidents of assault, threat or harassment. The National Asian Pacific American Legal Consortium reports that at least 30 Asian Pacific Americans died in 1993 as a result of homicides in which racial animus was suspected or proven.

A series of recent studies indicate that such "bias crimes" are a criminologically distinct category of offenses that present special risks to both society and intended victims. In comparison to other crimes, bias crimes are more likely to involve a heightened assault and injury level, serial victimizations, multiple assailants, stranger-based attacks, a spiral of community violence and extreme psychological trauma for victims.

To understand the deficiency in the federal criminal civil rights statutes in addressing these crimes, one must examine what federal prosecutors must prove in order to gain a conviction. There is no single, broadly applicable federal bias crime statute.

Generally, the federal statutes, as well as most of the corresponding state statutes, consist of three main elements: 1) an intentional victimization based on race, such as race; 2) forcible or threatened interference with a victim's civil rights; and 3) a victimization carried out by a method specified by statute.

Often these elements are too narrowly drafted to be effective. Other limitations further curb the statutes' utility to prosecutors.

Consider the opening example of this article: the 1988 shooting of Vernon Jordan, then-president of the National Urban League. Jordan was shot in the back and critically wounded after emerging from a car accompanied by a white woman, in Fort Wayne, Ind., in what President Jimmy Carter called "an assassination attempt."

Authorities later arrested Joseph Paul Franklin, who was charged under one of the primary federal criminal civil rights statutes, 18 U.S.C. section 245, "Forcible Interference With Civil Rights." The section was enacted in 1968 in response to a series of violent racial attacks aimed at preventing African Americans from voting, seeking employment, obtaining housing and using public accommodations.

Although a pre-eminent civil rights prosecutor was involved in the case, and although in post-trial newspaper interviews, jurors stated that they believed felt that Franklin "did it," Franklin was acquitted. As a consequence, state prosecutors stated they would not pursue state criminal charges because they were concerned about placing him in double jeopardy and because they believed that in light of the federal acquittal, they could not win a conviction.

Under 18 U.S.C. section 245, prosecutors had to prove not only that Franklin shot Jordan on the basis of Jordan's race, but also that he had done so with the specific intent of preventing Jordan from exercising one of the rights listed in the statute — the rights to education, jury service, housing and public accommodations, among other things. A generalized intent to murder someone on the basis of race is not enough to sustain a conviction.

Here, prosecutors were unable to prove that Franklin intended to prevent Jordan from using the hotel, a public accommodation. Although Jordan was shot out of racial animus, the perpetrator was unpunished for his act because of the antiquated and unnecessary public-accommodation requirement.

Another statute, 18 U.S.C. section 242, which prohibits "the deprivation of civil rights under color of law" and was used to prosecute the police officers in the Rodney King beating case, is equally flawed. The statute requires that a victim be a U.S. "inhabitant" before a civil rights deprivation by a government actor can be punished. The breadth of coverage afforded by the term "inhabitant" has been the subject of much dispute in the federal courts.

In *U.S. v. Mercedlie*, 807 F2d 716 (1st Cir. 1990), cert. denied, 112 S.Ct. 1980 (1992), the 1st U.S. Court of Appeals held that section 242 did not apply to a victim who was a "temporary foreign daytime visitor" to the United States. In Mercedlie, two Customs officers kidnapped a Dominican currency courier upon his entry into the United States, killed him and absconded with the $700,000 the courier was to deposit in an American bank. Because the court held that the victim was a temporary sojourner and not an inhabitant, the officers' conviction on the civil rights charges was reversed. On the other hand, the 9th Circuit has held that the word "inhabitants" means "persons." *U.S. v. Otherson*, 637 F2d 1276 (9th Cir. 1980), cert. denied, 454 U.S. 840 (1981). Thus, had the attack occurred in California, for instance, the conviction would have been sustained.

The remaining federal statutes in this area are similarly flawed. 18 U.S.C. section 241 prohibits conspiracies to interfere with the civil rights of *citizens* only. Individuals who target resident aliens, diplomats, undocumented persons or foreign tourists cannot be prosecuted under the statute.

42 U.S.C. section 3631, which protects against status-based interference with a person's right to housing, does not cover disability or sexual orientation. Thus, offenders who forcibly interfere with the housing rights of a mentally ill person, a gay person or someone with AIDS are not subject to prosecution. The criminals responsible for trying to drive lesbian community activists out of their homes in Overt, Miss., where they operate the retreat Camp Sister Spirit, are not eligible for prosecution under this federal criminal housing statute either, although clearly their housing rights are being violated.

Remarkable, the primary government civil rights agencies that perform fact-finding and mediation are also precluded by statute from addressing deprivations involving some of the most vulnerable status groups. For instance, the U.S. Commission on Civil Rights is not empowered by statute to study or investigate civil rights deprivations based on sexual orientation. The Justice Department's Community Relations (CRS), which provides mediation and other services to conflicted communities, is authorized by statute to address only racial conflicts. It was only through a highly unusual "walking order" issued directly by Attorney General Janet Reno that CRS was able to intervene in the Mississippi case involving the lesbian social service volunteers.

The federal government has a strong and longstanding obligation to protect civil rights. Discriminatory and violent criminal activity is at least as much a matter of federal concern as discrimination in civil law areas such as housing, education and employment. It is entirely appropriate for the federal government to punish and deter discriminatory violence by finally enacting a statute that gives clear notice that these acts will not be tolerated.

What is needed is a federal Civil Rights Prosecution Act (CRPA), broadly prohibiting interference with civil rights accomplished through force or threat of force. This proposal improves upon existing law by expanding the coverage of prosecuted conduct to all federally prosecuted activities and expands the number of protected status groups.

The proposed CRPA is based on existing state and federal bias crime law but encompasses many reforms. It would allow prosecution of offenders whether they are private citizens or government officials during the commission of an offense. Proof of conspiracy would not be necessary. And unlike other federal statutes that cover only race, color or religion, the statute would proscribe intimidation based on eight status categories including sexual orientation, gender and disability.

The proposed statute is worded to allow prosecution in bias-crime cases where the offender is mistaken regarding a person's status group. The wording also covers attacks between members of the same status group as long as the attack is based on the status of another individual. For example, it allows for the prosecution of cases where heterosexuals are attacked for associating with gays or lesbians, or where whites are attacked for associating with African Americans. The practical effect would be to create a right for all persons under the jurisdiction of the United States to be free from status-based violence and threat.

The available federal civil rights statutes are far too limited with regard to the deprivations they address and the classes of people protected. In some areas, state statutes are inadequate. Moreover, local authorities are sometimes indifferent or untrained with regard to identification and enforcement of civil rights violations.

All persons under the jurisdiction of the United States must be protected from violent interferences with a broad range of civil rights. The point of having civil rights statutes is to protect all individuals. To exclude those who are especially vulnerable to acts of violence precisely because of their diminished legal and social status defeats not only the underlying reasons we have civil rights laws but the moral legitimacy of those laws as well.

Brian Levin is legal director of the Center for the Study of Ethnic & Racial Violence, a Visiting Scholar at Stanford Law School in the area of bias violence policy and an attorney with Irell & Manella in Newport Beach. This article is adapted from an article in the Journal of Intergroup Relations.

PREPARED STATEMENT OF BRIAN LEVIN, DIRECTOR, CENTER ON HATE & EXTREMISM, RICHARD STOCKTON COLLEGE

HEARING BEFORE THE HOUSE JUDICIARY COMMITTEE, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, JULY 6, 1994, JACKSON, MS

Anti-gay bias attacks, in particular are notable for a prevalence of multiple stab wounds and strikes, dismemberments, facial injuries, castrations and mutilations. Anti-gay attacks are further typified by offenders who travel to predominately gay areas to violently seek out potential victims. For example, the Houston Police Department abruptly halted a sting operation involving undercover- police in the predominately gay Montrose section of the city because five officers were injured in four separate incidents over a ten day period. The operation was instituted following the murder of a young gay banker by ten suburban youths who came to Houston to hunt down a gay victim.

Other empirical evidence highlights the severity of bias crime. Bias crimes typically involve serial attacks that escalate in severity, primarily because there is no meaningful sanction to discourage the behavior. Furthermore, law enforcement data indicates that these crimes pose a heightened risk of social disorder because members of relevant groups engage in random acts of violent retaliation. For example in the month after the aforementioned attack in Howard Beach, New York experienced double the number of bias crimes.

The prevalence of bias crimes is difficult to assess because of under reporting by victims and police. Last week the FBI's latest survey covering 56% of the population showed that 7684 hate crimes were reported by participating agencies in 1993. An analysis I conducted of bias crime reported to law enforcement in 1992 revealed 8303 bias crimes, with the majority of established tracking systems experiencing a record year. When adjustments were made to account for under reporting, the number ballooned up to 37,000 or about one bias crime every fourteen minutes.

Current statistics suggest that gays and lesbians are emerging as one of the primary targets for the most violent bias attacks The FBI's report shows the proportion of anti-gay attacks grew by about one third in 1993. While some of this increase is due to better record keeping, there are indications that this may be part of an overall

Interestingly, there is no broadly applicable federal bias crime law. Existing federal civil rights statutes require additional elements be proved, besides the fact that a victim was targeted on account of status, to sustain a conviction. These elements include a showing of state action, a conspiracy or the intent to interfere with only certain statutorily enumerated rights such as voting. The result is illogical -a racially motivated lynching could easily escape the jurisdiction of federal civil rights statutes.

Congress may enhance the federal response to bias crime by:

1. Enacting a broadly applicable civil rights law which simply proscribes willful intimidation, injury or oppression of others in the exercise of federally protected civil rights, when the conduct is based on race, religion, national origin, sexual orientation, disability, gender or undocumented status;
2. Creating federal civil injunctions to immediately stop perpetrators of serial bias attacks;
3. Allowing bias victims to collect damages from their assailants in federal court;
4. Expanding the mandate of the U.S. Commission on Civil Rights and the Community Relations Service;
5. Reauthorizing the Hate Crime Statistics Act.

The federal government has a compelling obligation to protect all persons within its confines from status based attacks. These crimes are more violent and socially disruptive than non-bias crimes. They breed fear and distrust along already fragile intergroup lines and terrorize individuals beyond the confines of state and local borders. The federal government is uniquely suited to respond to discriminatory violence, interference with interstate commerce, the individual right to intimate associations and the affirmative

[d] To protect the right victims:

No evidence obtained in the investigation or prosecution of this offense shall be allowed in any proceeding, including but not limited to, immigration or military hearings, where a person's status (as designated in section [a]) is the basis of the inquiry.

To the fullest extent possible and at the discretion of the victim, a victim's identity shall remain confidential until court proceedings require disclosure.

The mere presence of a victim or the victim's property within the territorial or military jurisdiction of the United States shall confer jurisdiction pursuant to this statute.

[e] The parties so injured or deprived pursuant to this statute may have an action for recovery of damages occasioned by such injury or deprivation.

Statute of Limitations: (As long as federal law permits] Penalty: Maximum of 1 year imprisonment and $1000 fine, where bodily injury results, 10 years and/or $10,000 maximum. If death results, life imprisonment. Convicted offenders must undergo a federally approved program of rehabilitation and education.

Notes: Broadly prohibits interference with civil rights secured by federal laws or the Constitution and extends cover-age to otherwise unprotected status group such as undocumented persons. Prevents evidence about a victim's status from being used against him in official proceedings such as deportation hearings and court martials. The statute also provides civil remedies for victims. Would cover victimizations committed in the Armed Services, thus this would amend the Uniform Code of Military Justice, which has no bias provision at the present time. Statutory limitations prevent its application in instances where there is an analogous state of federal prosecution.

HATE CRIME STATUTES BY JURISDICTION
WA
OR
CA
ID
NV
MT
WY
UT
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
IA
MO
AR
LA
WI
IL
MS
MI
IN
TN
AL
OH
KY
GA
WV
SC
PA
VA
NC
FL
NY
MD
DE
NJ
CT
RI
MA
VT
NH
ME
DC
HI
AK
FEDERAL LAW
MILITARY LAW
Jurisdictions With Hate Crime Statutes
Jurisdictions Without Hate Crime Statutes

CIVIL RIGHTS PROSECUTIONS INVOLVING RACIAL VIOLENCE
[as of 1/31/98]

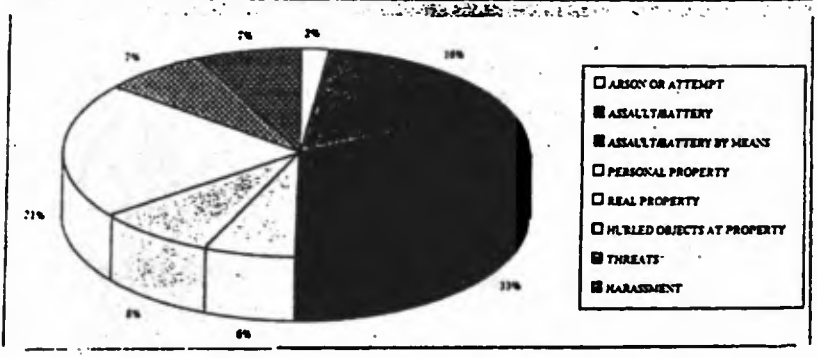
FISCAL YEAR	RACIAL VIOLENCE CASES WITH KKK AND ORGANIZED HATE GROUP DEFENDANTS		NON-KKK DEFENDANT RACIAL VIOLENCE CASES		TOTAL NUMBER OF RACIAL VIOLENCE CASES	
DATE	Cases	Defts.	Cases	Defts.	Cases	Defts.
98	0	0	2	4	2	4
97	2	4	19	39	21	43
96	5	12	33	53	38	65
95	6	10	37	56	43	66
94	10	22	26	52	36	74
93	5	8	18	29	23	37
92	8	16	24	32	32	48
91	14	28	16	25	30	53
90	13	15	22	31	35	46
89	9	18	33	45	42	63
88	1	1	12	19	13	20
87	2	9	13	19	15	28
86	2	13	5	8	7	21
85	6	16	5	14	11	30
84	5	17	8	19	13	36
83	4	12	6	12	10	24
82	4	7	4	7	8	14
81	2	5	2	2	4	7
80	6	11	3	5	9	16
79	2	23	3	3	5	26
78	0	0	4	6	4	6
77	0	0	4	8	4	8

Source: B. Levin, "Bias Crime: A Theoretical & Practical Overview," 4 Stanford Law & Policy Review 165 (1992-3)

BRIAN LEVIN

Figure 1:

Boston Bias Crimes by Offense 1978 - 1991[12]



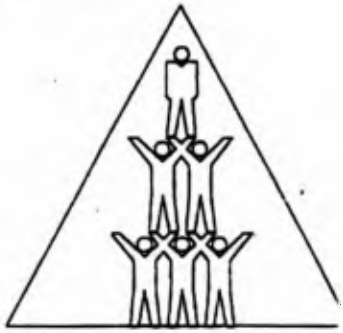
The SEDITIONIST

A QUARTERLY JOURNAL OF SEDITIOUS THOUGHT — POUL KJELDAARD EDITOR

ISSUE 12, FEBRUARY 1992: FINAL EDITION

LEADERLESS RESISTANCE

The concept of **Leaderless Resistance** was proposed by Col. Ulius Louis Amoss, who was the founder of International Service of Information Incorporated, located in Baltimore, Maryland. Col. Amoss died more than fifteen years ago, but during his life was a tireless opponent of communism, as well as a skilled Intelligence Officer. Col. Amoss first wrote of **Leaderless Resistance** on April 17, 1962. His theories of organization were primarily directed against the threat of eventual Communist take-over in the United States. The present writer, with the benefit of having lived many years beyond Col. Amoss, has taken his theories and expounded upon them. Col. Amoss feared the Communists. This author fears the federal government. Communism now represents a threat to no one in the United States, while federal tyranny represents a threat to <u>everyone</u>. The writer has joyfully lived long enough to see the dying breaths of communism, but may, unhappily, remain long enough to see the last grasps of freedom in America.



In the hope that, somehow, America can still produce the brave sons and daughters necessary to fight off ever increasing persecution and oppression, this essay is offered. Frankly, it is too close to call at this point. Those who love liberty, and believe in freedom enough to fight for it are rare today, but within the bosom of every once great nation, there remains secreted, the pearls of former greatness. They are there. I have looked into their sparking eyes; sharing a brief moment in time with them as I passed through this life. Relished their friendship, endured their pain, and they mine. We are a band of brothers, native to the soil gaining strength one from another as we have rushed head long into a battle that all the weaker, timid men, say we can not win. Perhaps...but then again, perhaps we can. It's not over till the last freedom fighter is buried or imprisoned, or the same happens to those who would destroy their liberty.

PREPARED STATEMENT OF THE ANTI-DEFAMATION LEAGUE

The Anti-Defamation League is pleased to provide testimony as the House Judiciary Committee conducts hearings on H.R. 3081, the Hate Crimes Prevention Act (HCPA). This necessary legislation, introduced under the leadership of Reps. Schumer and McCollum, would eliminate gaps in federal authority to investigate and prosecute bias-motivated crimes. Federal authorities must have jurisdiction to address those cases in which local authorities are either unable or unwilling to act.

Last month the nation was shocked by the senseless, brutal murder of James Byrd, Jr. in Jasper, Texas. Everything we know about this horrible crime indicates that Mr. Byrd was targeted for violence because of his race—allegedly by individuals associated with a white supremacist group. In this case, local law enforcement officials have responded effectively, but crimes of this magnitude transcend local communities and have national impact. To underscore the nation's determination to confront bias-motivated crimes, the federal government must have the opportunity to act in partnership with state and local officials. Where appropriate, the federal government should have the authority to take the lead in prosecuting these cases.

Under current federal law, the government must prove that the crime occurred because of a person's membership in a protected group, such as race or religion, *and because* he/she was engaging in a federally-protected activity (such as voting, going to school, or working). The HCPA would eliminate these overly-restrictive limitations and provide authority for federal investigations and prosecutions in cases in which the bias violence occurs because of the victim's sexual orientation, gender, or disability.

The Anti-Defamation League

Since 1913, the mission of ADL has been to "stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." Dedicated to combatting anti-Semitism, prejudice, and bigotry of all kinds, defending democratic ideals and promoting civil rights, ADL is proud of its leadership role in the development of innovative materials, programs, and services that build bridges of communication, understanding, and respect among diverse racial, religious, and ethnic groups.

Over the past decade, the League has been recognized as a leading resource on effective responses to violent bigotry, conducting an annual Audit of Anti-Semitic Incidents, drafting model hate crime statutes for state legislatures, and serving as a principal resource for the FBI in developing training and outreach materials for the Hate Crime Statistics Act (HCSA), which requires the Justice Department to collect statistics on hate violence from law enforcement officials across the country.

The attempt to eliminate prejudice requires that Americans develop respect and acceptance of cultural differences and begin to establish dialogue across ethnic, cultural, and religious boundaries. Education and exposure are the cornerstones of a long-term solution to prejudice, discrimination, bigotry, and anti-Semitism. Effective response to hate violence by public officials and law enforcement authorities can play an essential role in deterring and preventing these crimes.

Defining the Issue: The Impact of Hate Violence

All Americans have a stake in effective response to violent bigotry. These crimes demand a priority response because of their special impact on the victim and the victim's community. Bias crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. Failure to address this unique type of crime could cause an isolated incident to explode into widespread community tension. The damage done by hate crimes cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry, and suspicious of other groups—and of the power structure that is supposed to protect them—these incidents can damage the fabric of our society and fragment communities.

Hate Crime Statutes: A Message to Victims and Perpetrators

In partnership with human rights groups, civic leaders and law enforcement officials can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims. While bigotry cannot be outlawed, hate crime penalty enhancement statutes demonstrate an important commitment to confront criminal activity motivated by prejudice.

At present, forty states and the District of Columbia have enacted hate crime penalty-enhancement laws, many based on an ADL model statute drafted in 1981. In *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), the U.S. Supreme Court unanimously upheld the constitutionality of the Wisconsin penalty-enhancement statute—effec-

tively removing any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is intentionally targeted because of his/her race, religion, sexual orientation, gender, or ethnicity. [For additional information about the constitutionality of hate crime statutes, see the attached section on this subject.]

Improving the Federal Government's Response to Bias-Motivated Violence

The historic White House Conference on Hate Crimes on November 10, 1997 went far beyond the usual photo opportunities and Presidential pomp. Following the President's announcement of the Conference in an eloquent June 7 Radio Address on hate violence, Justice Department and Department of Education officials prepared comprehensive inventories of existing federal resources and programs on the issue. Working groups met repeatedly within the Justice Department, bringing together government experts, law enforcement groups, academics, and civil rights activists to assess future needs and establish priorities.

In speeches, panels, and workshops throughout the Conference, the President, the Vice President, and six Cabinet members stressed the importance of direct action against bias-motivated crime. The Conference itself provided the forum for the announcement of a number of substantive policy pronouncements, including: the establishment of regional U.S. Attorney-led police-community hate crime task forces, additional FBI hate crime investigators and Justice Department prosecutors, a Justice Department hate crime web site for children, the development of coordinated federal law enforcement hate crime training programs, a joint Justice Department/Education Department hate crime resource guide for public schools—and support for the HCPA.

Addressing Limitations in Existing Federal Civil Rights Statutes

The HCPA would amend Section 245 of Title 18 U.S. C., one of the primary statutes used to combat racial and religious bias-motivated violence. The current statute, enacted in 1968, prohibits intentional interference, by force or threat of force, with the enjoyment of a federal right or benefit (such as voting, going to school, or working) on the basis of race, color, religion, or national origin.

As mentioned, under the current statute, the government must prove *both* that the crime occurred because of a person's membership in a protected group, such as race or religion, *and because* (not *while*) he/she was engaging in a federally-protected activity. Justice Department officials have identified a number of significant racial violence cases in which federal prosecutions have been stymied by these unwieldy dual jurisdictional requirements. In addition, federal authorities are currently unable to involve themselves in cases involving death or serious bodily injury resulting from crimes directed at individuals because of their sexual orientation, gender, or disability -even when local law enforcement remedies are not available.

The HCPA would amend 18 U.S. C. 245 in two ways. First, the legislation would remove the overly-restrictive obstacles to federal involvement by permitting prosecutions without having to prove that the victim was attacked because he/she was engaged in a federally-protected activity. Second, it would provide new authority for federal officials to investigate and prosecute cases in which the bias violence occurs because of the victim's real or perceived sexual orientation, gender, or disability.

If adopted, the HCPA would expand the universe of possible federal criminal civil rights violations—and Congress and the Administration should match this increased authority with additional appropriations for FBI investigators and Justice Department prosecutors. Similarly, after expanding federal authority to address the disturbing series of attacks against houses of worship in the Church Arson Prevention Act of 1996, Congress provided additional funds to ensure that federal authorities had the resources to follow through on the promise of the new law.

Clearly, however, neither the sponsors nor the supporters of this measure expect that federal prosecutors will seek to investigate and prosecute every bias crime as a federal criminal civil rights violation. The vast majority of bias-motivated crimes should be handled by state and local law enforcement officials. But some crimes will merit federal involvement—for exactly the same reasons that Congress in 1968 determined that certain crimes directed at individuals because of "race, color, religion or national origin" required a federal remedy.

While recognizing that state and local law enforcement officials play the primary role in the prosecution of hate violence, the federal government must have clear authority to address those cases in which local officials are either unable or unwilling to investigate and prosecute. In those states without hate crime statutes, and in others with limited coverage, local prosecutors are simply not able to pursue bias crime convictions. Currently, only twenty-one states include sexual orientation-based crimes in their hate crimes statutes, twenty states include coverage of gender-based

crimes, and twenty-two states include coverage for disability-based crimes. [see the attached chart of state hate crimes statutory provisions and the separate maps on this point]. Other cases which could clearly merit federal involvement include those in which local law enforcement officials refuse to act because, for example, the rapist or the batterer in a small town is a friend or relative of the Police Chief, the District Attorney, or the Mayor.

Limitations on Federal Hate Crime Prosecutions

As drafted, the HCPA contains a number of significant limitations on prosecutorial discretion. First, the bill's requirement of actual injury, or, in the case of crimes involving "the use of fire, a firearm, or any explosive device, an attempt to cause bodily injury," limits the federal government's jurisdiction to the most serious crimes of violence against individuals—not property crimes.

Second, for the proposed new categories—gender, sexual orientation, and disability—federal prosecutors will have to prove an interstate commerce connection with the crime—similar to the constitutional basis relied upon for the Church Arson Prevention Act passed *unanimously* by Congress in 1997.

Third, the HCPA retains the current certification requirement under 18 U.S. C. 245. This institutional limitation on prosecutions requires the Attorney General, or her/his designee, to certify in writing that an individual prosecution "is in the public interest and necessary to secure substantial justice."

Finally, Justice Department officials have traditionally been extremely selective in prosecuting cases under the federal criminal civil rights statutes. For example, in 1996, a year in which the FBI's HCSA report documented 8,759 crimes reported by 11,355 police agencies, the Justice Department brought only thirty-eight racial violence cases under all federal criminal civil rights statutes combined—and only eight cases under 18 U.S.C. 245. In fact, since its enactment in 1968, there have never been more than ten prosecutions per year under 18 U. S.C. 245. Federal prosecutors can be expected to continue to defer to state authorities under its expanded authority—but the HCPA will permit prosecutions of bias-motivated violence that might not otherwise receive the attention they deserve.

Supporters of the HCPA know well that new federal criminal civil rights jurisdiction to address crimes directed at individuals because of their gender, sexual orientation, or disability will not result in the elimination of these crimes. But the possibility of federal involvement in select cases, the impact of FBI investigations in others, and partnership arrangements with state and local investigators in still other cases, should prompt more effective state and local prosecutions of these crimes.

Recent Federal Responses to Hate Violence

The federal government has an essential leadership role to play in confronting criminal activity motivated by prejudice and in promoting prejudice reduction initiatives for schools and the community. In recent years, Congress has provided broad, bipartisan support for several federal initiatives to address these crimes. These initiatives have led to significant improvements in the response of the criminal justice system to bias-motivated crime. The HCPA is based on the hate crime definitions established in these previous enactments—and builds on the foundation of these existing laws.

1) The Hate Crime Statistics Act (HCSA) (Public Law 101-275)

Enacted in 1990, the HCSA requires the Justice Department to acquire data on crimes which "manifest prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies across the country and to publish an annual summary of the findings. In the Violent Crime Control and Law Enforcement Act of 1994, Congress expanded coverage of the HCSA to require FBI reporting on crimes based on "disability."

Six Years of HCSA Data: Progress and Significant Promise

The FBI documented a total of 4,558 hate crimes in 1991, reported from almost 2,800 police departments in 32 states. The Bureau's 1992 data, released in March, 1994, documented 7,442 hate crime incidents reported from more than twice as many agencies, 6,181—representing 42 states and the District of Columbia. For 1993, the FBI reported 7,587 hate crimes from 6,865 agencies in 47 states and the District of Columbia. The FBI's 1994 statistics documented 5,932 hate crimes, reported by 7,356 law enforcement agencies across the country. The FBI's 1995 HCSA report documented 7,947 crimes reported by 9,584 agencies across the country.

The FBI's most recent HCSA report, for, 1996, documented 8,759 hate crimes reported to the FBI by 11,355 agencies across the country. The FBI report indicated that about 63% of the reported hate crimes were race-based, with 14% committed

against individuals on the basis of their religion, 11% on the basis of ethnicity, and 12% on the basis of sexual orientation. Approximately 42% of the reported crimes were anti-Black, 13% of the crimes were anti-White. The 1, 109 crimes against Jews and Jewish institutions comprised almost 13 % of the total—and 79% of the reported hate crimes based on religion. 4% of the crimes were anti-Asian, and just over 6% were anti-Hispanic. [For additional details, see the attached comparison of FBI hate crime statistics from 1991–96]

2) Hate Crime Sentencing Enhancement Act (128 U.S.C. 994)

Congress enacted a federal complement to state hate crime penalty-enhancement statutes in the 1994 crime bill. This provision required the United States Sentencing Commission to increase the penalties for crimes in which the victim was selected "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." This measure applies, *inter alia*, to attacks and vandalism which occur in national parks and on federal property.

In May, 1995, the United States Sentencing Commission announced its implementation of a three-level sentencing guidelines increase for hate crimes, as directed by Congress. This amendment took effect on November 1, 1995.

3) Violence Against Women Act (VAWA) (42 U.S.C. 13981)

Enacted as Title IV of the 1994 crime bill, VAWA addresses the problem of violent crime against women by providing authority for domestic violence and rape crisis centers and for education and training programs for law enforcement officials and prosecutors. Importantly, VAWA established a new federal civil remedy for victims of gender-based violent crimes which provides them with the right to compensatory and punitive damage awards, as well as injunctive relief.

4) Church Arson Prevention Act (CAPA) (Public; Law 104–155)

This measure, sponsored by Sens. Lauch Faircloth (R–NC) and Edward Kennedy (D–MA), and, in the House, by Reps. Henry Hyde (R–IL) and John Conyers (D–MI), was originally designed solely to facilitate federal investigations and prosecutions of these crimes by amending 18 U.S.C. 247, a statute enacted by Congress in 1988 to provide federal jurisdiction for religious vandalism cases in which the destruction exceeds $10,000. Hearings were held on both the impact of these crimes and the appropriate response of government. Federal prosecutors testified that the statute's restrictive interstate commerce requirement and its relatively significant damages threshold had been obstacles to federal prosecutions.

Following the hearings, Congress found that "[t]he incidence of arson of places of religious worship has recently increased, especially in the context of places of religious worship that serve predominately African-American congregations." Legislators appropriately recognized that the nation's response to the rash of arsons should be more ambitious and comprehensive than mere efforts to ensure swift and sure punishment for the perpetrators.

In a welcome, if very rare, example of bipartisanship, both the House and the Senate *unanimously* approved legislation which broadened existing federal criminal jurisdiction and facilitated criminal prosecutions for attacks against houses of worship, increased penalties for these crimes, established a loan guarantee recovery fund for rebuilding, and authorized additional personnel for BATF, the FBI, Justice Department prosecutors, and the Justice Department's Community Relations Service to "investigate, prevent, and respond" to these incidents. Recognizing that data collection efforts complement criminal prosecutions of hate crime offenders, Congress included a continuing mandate for the HCSA. According to Justice Department officials, from January 1, 1995 to July, 1998, DOJ opened over 600 investigations of suspicious fires, bombings, and attempted bombings; made arrests in over 275 of these incidents, with 145 convictions to date—including 12 under CAPA.

Conclusion

The fundamental cause of bias-motivated violence in the United States is the persistence of racism, bigotry, and anti-Semitism. Unfortunately, there are no quick, complete solutions to these problems. Ultimately, the impact of a bias crime initiatives will be measured in the response of the criminal justice system to the individual act of hate violence. Enactment of the Hate Crime Prevention Act, along with implementation of other hate crime training, prevention, and anti-bias education initiatives announced at the White House Conference on Hate Crimes is, in the language of 18 U.S.C. 245 itself, "in the public interest and necessary to secure substantial justice."

We applaud the leadership of the sponsors of this measure and urge the Judiciary Committee to approve this important legislation as soon as possible.

Hate crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. These crimes can have a special emotional and psychological impact, exacerbate racial, religious, or ethnic tensions, and lead to escalating reprisals. By making members of minority groups fearful, angry, and suspicious of other groups—and of the power structure that is supposed to protect them—these incidents can fragment communities.

At present, forty-eight states and the District of Columbia have enacted some type of statute addressing hate violence. In *Wisconsin* v. *Mitchell*,[1] decided in June, 1993, the U.S. Supreme Court unanimously upheld the constitutionality of a Wisconsin hate crime penalty-enhancement statute similar to current federal law and statutes in more than two dozen other states. The Court's decision removes any doubt that legislatures may properly increase the penalties for criminal activity in which the victim is targeted because of his/her race, religion, sexual orientation, gender, ethnicity, or disability.

The intent of penalty-enhancement hate crime laws is not only to reassure targeted groups by imposing serious punishment on hate crime perpetrators, but also to deter these crimes by demonstrating that they will be dealt with in a serious manner. Under these laws, no one is punished merely for bigoted thoughts, ideology, or speech. But when prejudice prompts an individual to act on these beliefs and engage in criminal conduct, a prosecutor may seek a more severe sentence, but must prove, beyond reasonable doubt, that the victim was intentionally selected because of his/her personal characteristics.

1) R.A.V. v. City of St. Paul

In *R.A.V.* v. *City of St. Paul*,[2] the Supreme Court evaluated for the first time a free speech challenge to a hate crime statute. In that case, the defendant had burned a cross "inside the fenced yard of a black family that lived across the street from the house where the [defendant] was staying." The ordinance before the Court, as interpreted by the Minnesota Supreme Court, criminalized so-called "fighting words" which "one knows or has reasonable grounds to know arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Fighting words are words which will provoke the person to whom they are directed to violence, and, more than fifty years ago, in *Chaplinsky* v. *New Hampshire*,[3] the Supreme Court decided that such words were not protected by the first amendment. Therefore, in *R.A.V.*, Minnesota argued that, because all so-called "fighting words" are outside first amendment protection, race-based fighting words could be criminalized.

The Court disagreed and struck down the statute. The Supreme Court held that, because Minnesota had not in fact criminalized all fighting words, the statute isolated certain words based on their content or viewpoint and therefore violated the first amendment. The Court noted that criminalizing only certain otherwise unprotected speech may be appropriate in three circumstances: (1) where the justification for criminalizing only a part of an otherwise unprotected, class of speech is the same reason (although greater in degree) that the unprotected class as a whole is considered evil—for example, a law which prohibited only the hardest core obscenity on the basis that it is "the most patently offensive"; (2) where the speech criminalized is selected based primarily on its secondary effects—for example, a statute which permitted all live obscene performances, except those involving children; or (3) where there is no possibility that official suppression of ideas is occurring *sub rosa*. The Court nevertheless found these exemptions inapplicable to the Minnesota statute.

Based on *R.A.V.*, hate crime statutes which criminalize bias-motivated speech or symbolic speech are unlikely to survive constitutional scrutiny. Particularly, cross-burning statutes or statutes criminalizing verbal intimidation are unlikely to be upheld. In addition, more general civil rights statutes cannot be *applied* to pure speech or symbolic speech activities such as cross burning. For example, in a recent

[1] 508 U.S. 47 (1993).
[2] 505 U.S. 377 (1992).
[3] 315 U.S. 568 (1942). In *Chaplinsky*, the defendant had been convicted of issuing an insult after calling a city marshall a "racketeer" and a "damned fascist." The doctrine of "fighting words," elaborated in this one case, has, it is fair to say, played no significant role in the development of free speech jurisprudence. Use of the doctrine in *R.A.V.* gave every appearance of a last-ditch effort to salvage a problematic ordinance.

decision, *United States* v. *Lee*,[4] the United States Court of Appeals for the Eighth Circuit addressed the circumstances under which the federal statute making civil rights intimidation a crime would reach cross burning.[5] There, the defendant had burned a cross on the hill of an apartment complex and had directed it at one of the only black residents in the complex. Relying on *R.A.V.*, the court found that the federal statute could not constitutionally be used to prohibit most pure or symbolic speech of this type. "[A]s applied, . . . [this provision] focuses on the conduct's communicative and emotive impact. . . . Although there is an important governmental interest in protecting the exercise of the black residents' right to occupy a dwelling free from intimidation, we cannot say that, under the circumstances before us, the governmental interest is unrelated to the suppression of free expression." Instead, the court held that the law could apply to pure speech or symbolic speech only in circumstances meeting the "clear and present danger" standard of *Brandenburg* v. *Ohio*:[6] "[U]nder *Brandenburg*, section 241 may be applied to Lee's prosecution as long as it is limited to punishing expression 'directed to inciting or producing imminent lawless action *and* it is likely to incite such action'" (emphasis added). Thus, *R.A.V.*, and *Lee* demonstrate that pure or symbolic bias-motivated speech, no matter how damaging to the target, cannot be outlawed solely on the basis of its effect on the victim.

2) Wisconsin v. Mitchell

In *Wisconsin* v. Mitchell, by contrast, the Supreme Court unanimously upheld a Wisconsin statute which provides for an enhanced sentence where the defendant "intentionally selects the person against whom the crime [is committed] because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." The defendant in *Mitchell* had incited a group of young black men who had just finished watching the movie *Mississippi Burning* to assault a young white man by asking "Do you all feel hyped up to move on some white people" and by calling out "You all want to f— somebody up? There goes a white boy; go get him."

Noting that "[t]raditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant," the Court rejected the defendant's contention that the enhancement statute penalized thought.

First, the Court affirmed that the statute was directed at a defendant's conduct—committing a crime. The enhanced penalty is appropriate, the Court said, "because this conduct is thought to inflict greater individual and societal harm." Second, the Court rejected the suggestion that the penalty enhancement would chill free speech. The Court held that, because the bias motivation would have to be connected with a specific act, there was little risk that the statute would chill protected bigoted speech. The statute focused not on the defendant's bigoted ideas, but rather on his actions based upon those ideas. Finally, the Court made clear that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." This last point was important because several courts had worried that using a defendant's speech to prove that a crime had been committed violated the first amendment by punishing speech. The Court's ruling makes clear that only the action proved—not the speech itself—is punished.

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[4] 6 F. 3rd 1297 (8th Cir., 1993).

[5] 18 U.S. C. § 241. That statute provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; * * *

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

[6] 395 U.S. 444 (1969).

COMPARISON OF FBI HATE CRIME STATISTICS 1991-1996

	1991	1992	1993	1994	1995	1996
Participating Agencies	***2,771***	***6,181***	***6,551***	***7,356***	***9,584***	***11,355***
Total Hate Crime Incidents Reported	4,558	6,623	7,587	5,932	7,947	8,759
Number of States, Including D.C.	***32***	***42***	***47***	***44***	***46***	***50***
Percentage of U.S. Population Agencies Represent	N/A	51	58	58	75	84

Offenders' Reported Motivations In Percentages of Offenses

	1991	1992	1993	1994	1995	1996
Racial Bias	***62.3***	***60.7***	***62.4***	***59.8***	***60.7***	***61.6***
Anti-Black	35.5	34.7	37.1	36.6	37.6	41.9
Anti-White	18.7	20.3	19.4	17	15.4	12.6
Religious Bias	***19.3***	***17.5***	***17.1***	***17.9***	***16.1***	***15.9***
Anti-Semitic	16.7	15.4	15.1	15.1	13.3	12.7
Anti-Semitic as Percentage of Religious Bias	***86.4***	***87.5***	***88.1***	***86.2***	***82.9***	***79.2***
Ethnicity	9.5	10.1	9.2	10.8	10.2	10.7
Sexual Orientation	***8.9***	***11.6***	***11.3***	***11.5***	***12.8***	***11.6***

* Chart created by the Anti-Defamation League Washington Office from data collected by the U.S. Department of Justice Federal Bureau of Investigation.

STATE BY STATE COMPARISON: HCSA REPORTING 1991-1996

A: Number of agencies participating in HCSA for each state
B: Number of incidents reported by agencies in the state
** indicates "did not report"

STATE	1991 A	1991 B	1992 A	1992 B	1993 A	1993 B	1994 A	1994 B	1995 A	1995 B	1996 A	1996 B
Alabama	**	**	4	4	4	5	**	**	**	**	289	0
Alaska	**	**	**	**	1	24	1	9	1	8	1	9
Arizona	1	48	90	172	89	208	82	205	87	220	81	250
Arkansas	169	10	183	37	187	13	189	9	190	7	191	1
California	2	5	7	75	11	364	13	354	744	1751	718	2052
Colorado	194	128	197	258	199	178	231	173	228	149	230	133
Connecticut	29	69	23	62	39	117	89	68	94	87	98	114
Delaware	58	29	57	47	49	33	51	42	51	45	50	67
District of Columbia	**	**	1	14	1	10	1	2	1	4	1	16
Florida	**	**	374	334	374	239	370	214	411	164	394	187
Georgia	2	23	4	66	4	78	3	51	3	49	2	28
Hawaii	**	**	**	**	**	**	**	**	**	**	**	**
Idaho	88	33	116	54	110	70	117	76	116	114	112	72
Illinois	26	133	620	241	224	724	19	239	1	146	114	333
Indiana	1	0	5	16	62	62	89	32	164	35	179	36
Iowa	201	89	190	36	196	39	226	61	232	29	231	43
Kansas	3	6	2	3	1	0	**	**	**	**	1	28
Kentucky	1	0	2	5	3	13	5	4	513	81	527	109
Louisiana	6	0	10	13	58	23	92	9	146	7	140	6
Maine	**	**	9	19	6	32	5	7	130	76	131	58
Maryland	156	431	156	484	153	404	150	325	148	353	148	387
Massachusetts	30	200	158	424	136	343	**	**	202	333	405	464

STATE	1991 A	1991 B	1992 A	1992 B	1993 A	1993 B	1994 A	1994 B	1995 A	1995 B	1996 A	1996 B
Michigan	--	--	454	122	555	247	518	252	480	405	485	485
Minnesota	42	225	69	411	66	377	--	--	66	285	307	268
Mississippi	4	1	1	0	17	0	53	6	51	6	129	3
Missouri	18	136	17	158	81	168	155	139	157	135	230	150
Montana	--	--	--	--	16	21	2	0	6	11	95	10
Nebraska	--	--	--	--	--	--	--	--	--	--	10	3
Nevada	1	16	3	23	9	12	5	16	35	68	4	44
New Hampshire	--	--	--	--	1		2	3	2	24	2	1
New Jersey	271	695	291	1114	317	1101	559	895	568	768	568	839
New Mexico	1	0	--	--	13	4	57	4	70	24	70	44
New York	773	943	569	1112	571	934	567	911	520	845	499	903
North Carolina	--	--	1	1	6	10	7	7	59	52	83	34
North Dakota	--	--	1	1	91	1	82	5	74	3	101	1
Ohio	30	80	26	105	128	260	266	357	321	267	405	234
Oklahoma	7	99	9	147	9	60	4	20	7	37	293	83
Oregon	39	296	279	376	279	237	206	177	243	152	174	172
Pennsylvania	50	277	944	432	1036	391	1044	276	1134	262	1137	205
Rhode Island	--	--	44	48	45	62	45	37	45	48	48	40
South Carolina	--	--	4	4	295	27	302	30	293	26	340	42
South Dakota	--	--	--	--	3	4	4	1	38	5	32	3
Tennessee	2	1	2	4	56	2	113	20	104	25	191	33
Texas	26	95	670	486	879	418	895	364	914	328	916	350
Utah	--	--	9	12	121	45	123	93	116	107	124	59
Vermont	--	--	--	--	1	1	18	12	19	10	3	4

STATE	1991 A	1991 B	1992 A	1992 B	1993 A	1993 B	1994 A	1994 B	1995 A	1995 B	1996 A	1996 B
Virginia	19	53	24	102	21	108	180	96	175	51	409	92
Washington	206	196	207	374	207	457	226	281	229	266	230	196
West Virginia	--	--	--	--	--	--	--	--	--	--	22	4
Wisconsin	303	41	145	87	181	19	150	40	337	45	338	43
Wyoming	--	--	5	0	49	10	60	6	59	19	70	4

*Chart created by the Anti-Defamation League Washington Office from data collected by the U.S. Department of Justice Federal Bureau of Investigation.

STATES THAT DO NOT PROVIDE FOR ENHANCED PENALTIES FOR HATE CRIMES BASED ON SEXUAL ORIENTATION.

STATES THAT DO NOT PROVIDE FOR ENHANCED PENALTIES FOR HATE CRIMES BASED ON MENTAL AND PHYSICAL DISABILITY OR HANDICAP.

STATES THAT DO NOT PROVIDE FOR ENHANCED PENALTIES FOR GENDER-BASED HATE CRIMES.

STATE HATE CRIMES STATUTORY PROVISIONS

	AL	AK	AZ	AR	CA	CO	CT	DC	DE	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO
Bias-Motivated Violence and Intimidation	✓	✓	✓		✓	✓	✓	✓	✓	✓			✓	✓		✓			✓	✓	✓	✓	✓	✓	✓	✓
Civil Action				✓	✓	✓	✓	✓		✓			✓	✓		✓			✓			✓	✓			✓
Criminal Penalty	✓	✓	✓		✓	✓	✓	✓	✓	✓			✓	✓		✓			✓	✓	✓	✓	✓	✓	✓	✓
Race, Religion[1], Ethnicity	✓	✓	✓		✓	✓	✓	✓	✓	✓			✓	✓		✓			✓	✓	✓	✓	✓	✓	✓	✓
Sexual Orientation			✓		✓		✓	✓	✓	✓				✓		✓			✓	✓		✓		✓		
Gender		✓	✓		✓			✓						✓		✓			✓	✓			✓	✓	✓	
Other[2]	✓	✓	✓		✓			✓	✓					✓		✓			✓	✓		✓		✓		
Institutional Vandalism	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓		✓	✓	✓	✓	✓	✓		✓	✓	✓
Data Collection[3]			✓		✓		✓	✓		✓			✓	✓		✓		✓	✓	✓	✓	✓		✓		
Training for Law Enforcement Personnel[4]			✓		✓									✓		✓		✓	✓			✓		✓		

1. The following states also have statutes criminalizing interference with religious worship: CA, DC, FL, ID, MD, MA, MI, MN, MS, MO, NV, NM, NY, NC, OK, RI, SC, SD, TN, VA, WV.

2. "Other" includes mental and physical disability or handicap (AL, AK, AZ, CA, DC, DE, IL, IA, LA, ME, MA, MN, NE, NV, NH, NJ, NY, OK, RI, VT, WA, WI), political affiliation (DC, IA, LA, WV) and age (DC, IA, LA, VT).

3. States with data collection statutes which include sexual orientation are AZ, CA, CT, DC, FL, IL, IA, MD, MN, NV, OR and WA; those which include gender are AZ, DC, IL, IA, MN, WA.

4. Some other states have regulations mandating such training.

	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
Bias-motivated Violence and Intimidation	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓		✓		✓	✓		✓	✓	✓	✓		✓	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	
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Race, Religion[1], Ethnicity	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓		✓		✓	✓		✓	✓	✓	✓		✓	✓	✓	✓			✓	✓			✓	✓	✓	✓	✓	
Sexual Orientation		✓	✓	✓	✓							✓		✓								✓														✓		✓								✓		✓		✓	
Gender		✓		✓	✓		✓		✓			✓		✓								✓														✓		✓								✓		✓	✓		
Other[2]		✓	✓	✓	✓		✓		✓			✓		✓								✓														✓		✓								✓		✓	✓	✓	
Institutional Vandalism	✓		✓		✓	✓		✓		✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓		✓		✓	✓		✓	✓	✓	✓		✓	✓	✓	✓			✓	✓			✓	✓	✓	✓	✓	
Data Collection[3]		✓	✓		✓							✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓		✓		✓	✓		✓	✓	✓	✓		✓	✓	✓	✓			✓	✓			✓	✓	✓	✓	✓	
Training for Law Enforcement Personnel[4]												✓		✓								✓														✓		✓								✓		✓			

5. New York State law provides penalty enhancement limited to the crime of aggravated harassment.

6. The Texas Statute refers to victims selected "because of the defendant's bias or prejudice against a person or group."

7. The Utah Statute ties penalties for hate crimes to violations of the victim's constitutional or civil rights.

PREPARED STATEMENT OF PAMELA COUKOS, ESQ., THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE

Introduction

The National Coalition Against Domestic Violence (NCADV), which represents a nationwide network of over 2,000 domestic violence shelters and programs, joins Congressmen McCollum and Schumer and a broad coalition of civil rights organizations and law enforcement representatives, in support of the Hate Crimes Prosecution Act (HCPA), H. 3081.

The HCPA, which adds sexual orientation, gender and disability to an existing federal criminal civil rights law (18 U.S.C. §245), and eliminates the severe restrictions on prosecuting cases based on race, national origin and religion, recognizes that bias crimes are a problem of national significance. This bill would allow an appropriate federal role in prosecuting bias crimes where state and local officials are unable or unwilling to do so.

NCADV is strongly supportive of the inclusion of gender in §245, and our testimony focuses particularly on that aspect of the HCPA. This proposal builds on Congress' bipartisan commitment under the Violence Against Women Act, to treat gender-motivated violence as a civil rights violation.[1] The HCPA is an important component of a comprehensive strategy to fight violence against women.

The Need To Include Gender In Bias Crime Statutes

It is crucial that bias crime statutes include gender. Women, and in some cases men, are subjected to gender-based violent crimes that violate the individuals civil rights, like bias crimes committed because of a persons race, national origin, sexual orientation, religion or disability. Discrimination against women is an important factor in the perpetuation of domestic violence. Batterers may view women as inferior and believe they deserve to be beaten. Persistent bias against women in our criminal justice system protects abuse as a male privilege, giving men "permission" to batter.

Indeed, while gender-based violence may not be exactly like racist or homophobic violence, it shares many important qualities with other types of bias crimes. For example, gender-based violent crimes are motivated and encouraged by discriminatory attitudes against the group being assaulted, and cause other members of the group to be fearful and even change their behavior to avoid potential violence. Like other types of bias crimes, the acts may include epithets, severe violence and other hallmarks of hate crimes.

These crimes reflect a larger pattern of discrimination and send a message to all women that they are at risk. For women of color, or lesbians, bias crimes may include anti-woman bias as well as bias based on race or sexual orientation. When bias crime statutes leave out gender, they are covering up a very real form of discrimination.

A federal bias crimes law could fill important gaps left by deficiencies in state law. For example, only 20 jurisdictions currently include gender in their state bias crime laws.[2] Even in states that have adequate laws, enforcement problems can leave women unprotected from severe acts of violence.

In these situations of failed state enforcement, a federal prosecution is particularly appropriate. For example, if the perpetrator is a local official, a prominent person in the community, or close friends with law enforcement officers, the state system may not adequately investigate or prosecute the incident. While some localities have reformed their systems, in others police, prosecutors or judges still discount the seriousness of violence against women. In those jurisdictions where there is a systemic failure to address domestic violence, an individual federal prosecution of a particularly heinous crime can send a message that such a widespread violation of women's rights should not be tolerated.

Every act of rape or domestic violence will not be a violation of the HPCA. While some may view all or virtually all acts of sexual assault and domestic violence as gender-based, as a practical matter, not every act of domestic violence could be prosecuted as a federal civil rights crime. This is due to the bills requirement that the incident have a connection to interstate commerce, the need for substantial evidence of motivation, and resource limitations. There are only a few federal prosecutions of bias crimes based on race, national origin or religion each year. *Most domestic violence incidents will continue to be tried as state crimes of assault, rape, or murder.*

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[1] The civil rights provision of VAWA allows persons to bring a civil claim for an act of gender-based violence. 42 U.S.C. § 13981.

[2] Anti-Defamation League, *Hate Crimes Laws* 18–19 (1998).

However, in those important or egregious cases where federal support or intervention is needed, applying § 245 can have a dramatic effect. Women who do not get an adequate response from the state and local criminal justice system will have somewhere to turn, and prosecutors will have access to federal resources in complex cases.

How the HCPA Might Apply to Cases Involving Violence Against Women

To qualify for coverage, a gender-based bias crime must have circumstantial evidence that shows the perpetrator was motivated by gender, and the evidence must be sufficient to meet the high standard of proof in a criminal case. In addition, HCPA prosecutions require evidence that the act had a connection with interstate commerce.

A number of the factors listed in the FBI's existing training guide on evaluating evidence in bias crimes undoubtedly will be useful in determining gender bias for purposes of applying the HCPA—these include biased comments or epithets, written statements, gestures, graffitti, etc., previous similar incidents happening at the same location (e.g. multiple rape incidents in a particular fraternity house), the perception of the community about whether the incident was bias-motivated, whether the individual participates in activities promoting women (e.g. works at a feminist bookstore or domestic violence shelter), the perpetrator's history of previous similar incidents, the lack of other explanations for the incident, and others. Cases brought under similar civil rights actions, such as cases under Title VII, 42 U.S.C. § 1985(3), and others, also provide guidance.

Whatever one's position on the issue of whether rape, for example, is always gender-motivated, there surely are rapes with very strong evidence of gender-based motivation. Congress has already recognized all of these principles in passing the Violence Against Women Act civil rights remedy, and the HCPA continues that commitment.

Some have raised questions about gender-based violence, by asking whether it is possible for someone who knows, or is married to, or has dated a person can commit a hate crime against them. This question assumes that other forms of hate crimes—for example those based on race or on sexual orientation—are always committed by strangers. Although some bias crimes are committed by strangers, others are committed by neighbors, acquaintances, classmates, co-workers and other people known to the victim. An individual can be involved in a personal relationship and still mistreat their partner because of gender-based stereotypes. These might include beliefs that women who are not submissive deserve to be beaten, or that women who dress a particular way are asking to be raped.

Finally, the addition of gender, or any other new category to § 245 will not "dilute" more traditional race-based or religious-based protection, because it will not relieve us of the responsibility to continue to take race-based violence, or religious-based violence seriously. Indeed, the HCPA recognizes this by simultaneously strengthening federal enforcement of crimes based on race, national origin or religion while expanding protection against crimes based on sexual orientation, gender or disability, and by requesting additional personnel to carry out Congress' mandate. And for many women, addressing gender-based violence simultaneously with race-based violence or sexual orientation-based violence will provide increased protection from bias crimes.

Current Data on Gender-Based Violence

It is very hard to quantify the number of gender-based hate crimes, because there are very few state and no federal laws that cover reporting of gender-based violence. For example, the Hate Crimes Statistics Act does not include gender. Even in those states where there is a duty to report gender-based violence along with other forms of hate crimes, severe underreporting prevents any accurate count.

One way to get a sense of the scope of the problem is to examine the statistics for rape and domestic violence, although these numbers are not necessarily a reliable indicator of the cases that might be prosecuted under the HCPA. Indeed, it is likely that many incidents of rape or domestic violence will not be prosecutable under the HCPA because of insufficient evidence of gender-based motivation or because the incident lacks a connection to interstate commerce. Other forms of gender-based assaults, such as the infamous "Montreal case"[3] are not counted in statistics on domestic violence and sexual assault. However, even though sexual assault and domestic violence incidents are an inaccurate measure of gender-based violence,

[3] In 1989, engineering student Marc Lepine systematically and deliberately murdered a group of women based on gender animus.

they provide the only statistical basis that currently exists for estimating the size of the problem.

With respect to incidents of domestic violence, the Department of Justice annual Crime Victimization Survey provides a conservative estimate of just under 1 million incidents of assault, rape and murder committed against women by intimate partners annually between the years 1992 and 1996.[4]

The Department of Justice National Crime Victimization Survey estimated that in 1996 there were 307,000 incidents of rape and sexual assault and that women were ten times more likely to be victims of those crimes than men.[5]

Examples of Cases That Might Be Prosecuted Under the HCPA

Certain incidents of rape, domestic violence, and other forms of gender-based violence could be investigated and possibly prosecuted under the HCPA, if the following conditions are met:

- *There must be very strong evidence of gender-based motivation, which would be strong enough to satisfy a criminal standard, such as in the following examples:*

  Christy Brzonkala filed a VAWA claim against two fellow students in *Brzonkala* v. *Virginia Polytechnic*. According to her complaint, they had held her down and raped her repeatedly, and one of the assailants later bragged aloud in the university dining hall that he liked "to get girls drunk" and have aggressive sex with them. Judge Motz of the Fourth Circuit stated that "Virtually all of the earmarks of 'hate crimes' are asserted here: an unprovoked, severe attack, triggered by no other motive, and accompanied by language clearly stating bias."[6]

  Another VAWA case filed by Sheronne Thorpe described a campus gang rape very similar to Christy Brzonkala's, where she was raped by several different men while others stood outside the room "laughing and joking" and blocking the exit. They also stole her clothing so she would be unable to leave and called her a "slut."[7]

  In Massachusetts and Maine, authorities have used state hate crimes laws against serial batterers, because the patterns show clear gender bias. For example, in one Massachusetts case, a serial batterer preyed upon at least four women in separate relationships. He committed severe acts of physical and sexual violence, including beatings and rape. He called the women "sluts," "bitches," and "whores," and made negative comments about women in general and their abilities.[8]

  In Maine, Anthony Cabana has become the first defendant in the state charged with gender-based hate crimes. He has exhibited a pattern of misogynistic behavior against multiple victims with whom he'd had long-term relationships. All of his victims were kicked, punched, and choked on a regular basis, and subjected to gendered epithets such as "whore," "cunt," "bitch," and "slut." During at least one of the beatings, the defendant had yelled to his victim, "you women are all alike!"[9] The Maine Attorney General's office said that "the language used against [the women] is the equivalent of hate speech."[10] The use of a civil rights provision allowed prosecu-

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[4] Lawrence A. Greenfeld, et al, *Violence By Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends and Girlfriends* 3 (Bureau of Justice Statistics, 1998). Other estimates are much higher.

[5] Cheryl Ringel, Criminal, Victimization 1996 3,4 (Bureau of Justice Statistics, Nov. 1997). The comprehensive study *Rape in America* estimates that over 600,000 adult women are raped annually. RAPE IN AMERICA 2 (1993).

[6] *Brzonkala* v. *Virginia Polytechnic and State Univ*, 132 F.3d 949, 964 (4th Cir. 1997). *See also* Civil Action No. 95–1358–R (W. Dist. Va.), complaint filed Feb. 27, 1995, amended complaint filed March 1, 1996. No. 95–1358–R, Amended complaint, ¶¶ 13–20, 31. Complaint dismissed July 26, 1996, 935 F. Supp. 779 (W.D. Va. 1996); *on appeal*, No. 96–1814 (4th Cir.), *reversed and remanded*, 132 F.3d 949, *panel decision vacated and rehearing en banc pending*. The District Court also ruled that the allegations in her complaint met the standards for showing gender-based motivation under the VAWA civil rights provision, but held the statute unconstitutional. *Brzonkala*, 935 F. Supp. at 785.

[7] *Thorpe* v. *Flythe, et al*, No. 3:97CV117 (E.D. Va.), Amended complaint, ¶¶ 18–31.

[8] *Massachusetts* v. *Aboulaz*, No. 940984H (Mass. Sup. Ct. March 14, 1996).

[9] *Maine* v. *Cabana*, Superior Court, Civil Action, Docket No. CV–98 (Feb. 5, 1998).

[10] Mark Shanahan, "Gender-Hate Complaint Is a First For Maine," *Portland Press Herald* (Feb. 19, 1998).

tors to get a longer jail term against the abuser when he violated the civil protection order.[11]

- *There must be a connection to interstate or foreign commerce, such as the use of a gun that had traveled in interstate commerce, using the phone or mail, assaulting someone while they are at work, shopping, traveling on a bus, etc., or similar examples.*
- *The prosecution must serve important federal interests, as in the following examples:*

cases involving interstate conduct, such as the VAWA prosecution of a defendant who beat his wife, put her in his car, and drove her back and force between Kentucky and West Virginia while continuing to assault her.[12]

or *cases where the local authorities are unable or unwilling to fully respond*, such as serial rape cases that may stretch existing local investigation resources, or incidents of battering or sexual assault by prominent members of the community who may be shielded by local police or prosecutors, or cases where the local officials show a clear pattern of neglect, like in these cases:

In a recent New York failure to protect lawsuit, a woman who had a order of protection called police when her batterer violated the protection order by coming into her home and throwing her furniture onto the lawn. The responding officers' supervisor told the officers they did not have a basis to arrest him. Less than two hours after she placed that 911 call she was stabbed to death. Police found her husband covered in blood; in his pocket was a copy of the wife's order of protection.[13]

A woman named Deborah Evans reported on a weekend day to local police that her former boyfriend had held her hostage for three days and sexually assaulted her. The police made no attempt to arrest her boyfriend and told her to come back on Monday to file charges, concerned that her previous relationship "undermined" her claim of kidnapping. On her way back to the police station that Monday her boyfriend kidnapped and murdered her.[14]

In *Eagleston* v. *Guido*, a woman who filed ten police reports over a two month period documenting assaults, threats and harassament by her husband, was stabbed thirty times by him a few days after the tenth report. Despite her order of protection and the jurisdictions pro-arrest policy, the police only made one arrest in response to the reports, when they arrested both the victim and her husband together.[15]

or *cases involving egregious levels of violence*, such as the case where three men gang-raped and sodomized a woman on a Brooklyn rooftop, and then threw her down the 50-foot airshaft; amazingly she survived but suffered severe injuries.[16]

In another example, on July 9th in Golden, Co., William Neal confessed to torturing and killing three women with an ax, in addition to forcing a fourth woman to watch while he raped and bludgeoned one of the victims. One of the women had lived with the accused for at least two years.[17]

Gender-Based Violence, Interstate Commerce and the Lopez *Decision*

Some have asked whether there are any constitutional concerns with the inclusion of gender-based violence in light of the *Lopez* decision. The answer is that this bill is absolutely constitutional under current law. Because the HCPA allows the federal government to prosecute hate crimes based on gender *only* when they have a direct link to interstate commerce, the HCPA is fully in agreement with the principles identified in *United States* v. *Lopez*.[18]

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[11] This information is courtesy of Stephen L. Wessler, Assistant Attorney General, Augusta, Maine.

[12] *United States* v. *Bailey*, 112 F.3d 758 (4th. Cir.), *cert. denied*, 118 S.Ct. 240 (1997).

[13] *Mastrioanni* v. *County of Suffolk*, 97 N.Y. Int. 0209 (December 2, 1997).

[14] *Brown* v. *Grabowski*, 922 F.2d 1097, 1102 (3d Cir. 1990).

[15] *Eagleston* v. *Guido*, 41 F.3d 865, 869, 874 (2d Cir. 1994).

[16] Elizabeth Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 Harv. Women's L. J. 157, 163 (1994).

[17] Associated Press, "Colorado Man Accused in Torture, Slaying of 3 Women," *Washington Post* (Jul. 10, 1998).

[18] All of these points apply equally well to the prosecution of cases under any of the new categories, including sexual orientation and disability.

The first, and most important point, is that the section of the bill permitting prosecution of gender-based violence has a jurisdictional element. Even though no jurisdictional element is required under *Lopez*, a statute specifying that each case must be in or affecting interstate commerce is clearly constitutional. *See, e.g., United States* v. *Lopez*, 115 S. Ct. 1624, 1631 (1995); *United States* v. *Bishop*, 66 F.3d 569, 587–88 (3d Cir.), *cert denied*, 116 S.Ct. 681 (1995). The criminal provisions of the Violence Against Women Act, covering interstate domestic violence incidents, have also been upheld as consistent with *Lopez*.[19]

Secondly, Congress has frequently relied on the Commerce Clause to enact civil rights legislation, recognizing that in many instances public and private discrimination substantially affects interstate commerce. For example, in passing the Civil Rights Act of 1964, Congress documented how racial discrimination deterred individuals from traveling and from engaging in commerce.[20] Courts have upheld numerous federal civil rights statutes, including the present 18 U.S.C. §245, under the Commerce Clause.[21]

Finally, the findings in the proposed amendments show that these crimes have a substantial impact on interstate commerce, which are more than sufficient to satisfy the *Lopez* standard. The *Lopez* decision cited findings as relevant to determining the appropriate use of the Commerce Clause.[22] Numerous lower courts upholding statutes since the *Lopez* decision have noted that extensive Congressional findings supported Commerce Clause authority to pass the statute in question.[23] The proposed amendments contain extensive and very specific findings about the impact of these crimes on employment, interstate travel, education, and other economic activities.

it is important to note that, with respect to gender-based violence, federal courts have upheld a similar civil statute, the civil rights provision of the Violence Against Women Act (VAWA), under the Commerce Clause, recognizing the impact of gender-based violence on interstate commerce. *Crisonino* v. *N.Y. City Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997); *Anisimov* v. *Lake*, 982 F. Supp. 531 (M.D. Ill. 1997); *Seaton* v. *Seaton*, 971 F. Supp. 118 (E.D. Tenn. 1997); *Doe* v. *Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997); *Doe* v. *Doe*, 928 F. Supp. 608 (D. Conn. 1996).[24] The VAWA provision, which provides a civil remedy for individual acts of gender-based violence, does not contain a jurisdictional element like the HCPA, but has still survived multiple legal challenges.

Issues of Federalism

Congress has an important leadership role in protecting civil rights at the national level, and the HCPA fulfills that responsibility. This bill builds on the models of the Church Arson Prevention Act and the Violence Against Women Act, in striking the balance between federal and state responsibilities. In those two important recent pieces of legislation, Congress identified a need for federal leadership, as well as a need to work in partnership with state and local jurisdictions, to ensure that all citizens are kept safe from bias-motivated violence. The limited use of these laws demonstrate that authorizing dual federal/state authority does not overwhelm the federal system and does improve the overall response to criminal activity.

In fact, the HCPA encourages vital federal and state cooperation to fight hate crimes. In some cases, federal bias crime laws can help support local jurisdictions in their response to hate violence. This statute allows federal investigators to assist in complex investigations, including interstate cases, conspiracies, and other kinds of cases where federal resources and assistance proves necessary.

Unfortunately, as discussed earlier, state laws or, in certain situations, state enforcement may be inadequate. Federal laws like §245 fill the gaps left by in ade-

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[19] *See, e.g., United States* v. *Bailey*, 112 F.3d 758 (4th Cir.), *cert. denied*, 118 S.Ct. 240 (1997) (interstate domestic violence); *United States* v. *Wright*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1376 (1998) (interstate violation of a protection order).

[20] *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252–53 (1964).

[21] *See, e.g., United States* v. *Lane*, 883 F.2d 1484 (10th Cir. 1989) (§245); *EEOC* v. *Wyoming*, 460 U.S. 226 (1983) (Age Discrimination in Employment Act); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964) (Title II of the 1964 Civil Rights Act, and upholding by implication the entire Act).

[22] *Lopez*, 115 S.Ct. at 1631–32.

[23] *See, e.g., United States* v. *Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995) (federal drug statute); *see also United States* v. *Bishop*, 66 F.3d 569, 578–80 (3d Cir.), *cert denied*, 116 S.Ct. 681 (1995) (carjacking statute); *Cheffer* v. *Reno*, 55 F.3d 1517, 1520–21 (11th Cir. 1995) (FACE).

[24] A panel of the Fourth Circuit has also upheld the statute in *Brzonkala* v. *Virginia Polytechnic, et at*, 132 F.3d 949 (4th Cir. 1997), reversing the one District Court decision, *Brzonkala* v. *Virginia Polytechnic et at*, 935 F. Supp. 779 (W.D. Va. 1996), to strike down the VAWA civil rights provision under the Commerce Clause. However, the Fourth Circuit has recently vacated and granted *en banc* rehearing of the panel decision.

quate state remedies or problems in state enforcement, and may be the only remedy available if the perpetrator is a prominent or well-connected member of the community. Where local authorities are actively pursuing the case, federal law enforcement officers will merely play a limited monitoring role. Where local authorities are unable or unwilling to investigate or prosecute, § 245 provides a federal "backstop" that keeps victims of hate crimes from falling through the cracks, and reflects the historic federal role in protecting civil rights.

Federal laws like § 245 can encourage states to take hate crimes more seriously. A few federal prosecutions can provide the leadership to encourage more local authorities to pursue hate crimes aggressively. Having the FBI begin investigating a case may raise the level of awareness about hate crimes in the local community, and the seriousness with which hate crimes prosecutions are pursued.

Although there is a clear federal role in addressing bias crimes, the HCPA and § 245 are carefully structured to limit the impact on state authority. Because the current statute requires the Attorney General to certify that any case subject to federal prosecution "is in the public interest and necessary to secure substantial justice," 18 U.S.C. § 245(a)(1), only the most serious cases will be prosecuted under federal law. When Congress passed the original statute in 1968, they included this certification requirement to ensure that federal prosecutions under this statute did not intrude too much on state law enforcement and prosecutorial responses to hate violence. The federal statute has, in fact, been used in instances of egregious violence—such as murder cases, serious assaults, and bombings—particularly in situations where state responses proved insufficient. Federal prosecutions under § 245 have always been limited, and the historical trend towards identifying a few important and particularly egregious cases for federal involvement should continue under the HCPA

There are also no federalism concerns implicated by the HCPA that affect its constitutionality. In the wake of the *Lopez* decision, it is clear that Congress should make certain that they do not violate traditional areas of state sovereignty. The concurring opinion of Justices Kennedy and O'Connor stresses this aspect. See *Lopez*, 115 S. Ct. at 1641–42. In the case of a statute such as § 245, the important federal interest in prosecuting bias crimes as civil rights violations justifies the use of the Commerce Clause. As the *Doe* court noted in upholding the VAWA Civil Rights Remedy, bias crimes cause a special harm requiring a unique remedy. *Doe*, 929 F. Supp. at 616–617.

Conclusion

In short, allowing the federal government to prosecute select incidents of gender-based violence as civil rights violations is a vital tool in our struggle to end violence against women. NCADV urges the House to follow the bipartisan commitment of the Violence Against Women Act, and continue its leadership in response to domestic violence, by passing the Hate Crimes Prosecution Act this session.

Mr. HUTCHINSON. Perhaps they can submit something to us.

The Chair recognizes Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Mr. Sunstein, you mentioned the commerce clause not being in 1 and being in 2. Give me some comfort, and maybe I can't get any comfort, I would like it not to be in 2 and you mentioned the constitutionality as it is with it out of 2 and making 1 and 2 the same.

What are we facing?

Mr. SUNSTEIN. Okay, then the question would be whether clause 2, which does not involve race or color, could be supported by the 13th amendment, 14th amendment or the commerce clause.

The 13th amendment is the weakest basis because the 13th amendment isn't about those areas of discrimination, those bases for discrimination. The 14th amendment, to make a long story short, under existing law is not likely to be held sufficient by the current court.

The commerce clause I think would be a legitimate basis for asserting authority given certain findings on the connection between these kinds of hate crimes and interstate commerce.

Now, I think that would be a nice struggle in the lower courts. If you really want this bill to be upheld, I think to make it broader in section 2 is not a prudent course though your chances of success would be far from zero.

Ms. JACKSON LEE. So it is important to realize that the provision in boulders, if you will, the constitutionality of it is because you can cite the commerce clause and as Ranking Member Conyers has said, we have done a lot with the commerce clause and we would be on safer grounds?

Mr. SUNSTEIN. That is right.

Ms. JACKSON LEE. In earlier discussion there was some pointing to Assistant Secretary Lee about the issue of perception. I think our witness who was the victim was violated without a perception. Am I hearing—I have not heard you say this—somebody can attack someone who they perceive is black, African American, who is black but is not black in reality? Do you feel this legislation covers that adequately?

Mr. SUNSTEIN. As I say, I don't have a policy view. If the desire is to reach cases like Mr. Bangerter's, this one does that unambiguously because the word perception is there.

Ms. JACKSON LEE. Somebody violently beat up on the basis of perception is no less hurt.

Mr. SUNSTEIN. Sounds right to me.

Ms. JACKSON LEE. If the person is beat up, would you think it legitimate for the full impact of the Federal law and Federal jurisdiction and Federal interest to come down on the perpetrator of that violence?

Mr. SUNSTEIN. As a matter of constitutional authority, given the backdrop of what I said, yes.

Ms. JACKSON LEE. Mr. Chairman, I thank you for your indulgence. Let me say I would like to thank one of my state Senators, Senator Rodney Ellis in Texas, who let out a hate crimes legislation, unfortunately upon the brutal killing of another human being in Texas, unfortunately; even he will admit that politics did not allow it to be as strong as he would have liked it to be.

He is propelled with the additional tragedy of several deaths, because of which he will go to legislation '99. With that being said, I cannot imagine that we would not want further involvement of the Federal Government in instances where States don't have the sufficient authority, legislative authority, legal authority to prosecute these particular heinous acts.

So I believe this legislation is imperative and important and it will set the tone for so many States that have not complied and those with very weak laws.

With that, Mr. Chairman, I yield back the balance of my time.

Mr. HUTCHINSON. I thank the gentlelady and I thank the panel again.

The committee is grateful for your cooperation and testimony as well as for all the attentive members of the audience that have been watching through this.

Mr. SCOTT. Mr. Chairman.

Mr. HUTCHINSON. Yes, the gentleman from Virginia.

Mr. SCOTT. Could I be recognized very briefly?

Mr. HUTCHINSON. You would do that to me?

Mr. SCOTT. I might do even worse, Mr. Chairman. But just briefly.

Mr. HUTCHINSON. I do need to go. I need to adjourn this meeting.

Mr. SCOTT. I yield for a very brief time to the ranking member.

Mr. CONYERS. This is standard procedure, Mr. Hutchinson. You are in training for the chairmanship. This is known as on-the-job training. Unfortunately, you will not be able to use it because we are going to pick up the 11 seats that we need in November, but it is still good training nevertheless.

What we are faced with, between lunch and interpreting the Constitution, I suggest that all of our schedules have been interrupted and so forth, but we have not had a hearing on a Federal anti-lynch law ever. In 1909, the NAACP began to raise the question of an anti-lynch law 5 years after—well, it was formed in 1909, so it was 5 years after 1909. The executive secretary, Roy Wilkins, used to come to the Congress in the '40's and the '50's to petition. That was when they were reporting lynchings every week. The numbers were there. There was no question about it. But President Roosevelt would not entertain it.

Now here Chairman Hyde is entertaining it and, look, fellows, we are hungry, but we need to enforce the Constitution. These hearings did not come about to be abbreviated. Let us all understand that.

The only thing that I need to have on the record, and we can talk about it and go to lunch and all that, but the 13th amendment case of *Charisse Tafilla* and the companion case, does it weigh much in your opinions about this, Professor Harrison, about our subject matter today?

Mr. HARRISON. Very briefly, what those cases say, I think *St. Joseph's College* is the companion case, they came down together, both by Justice White, is that under certain circumstances national origin or religion can also be race. But that is not to say that they are independently covered by the 13th amendment. So when they are covered by the 13th amendment, they would be picked up by the reference to race already. And to the extent that they are not race, the 13th amendment does not cover them. I think that is what those cases stand for.

Mr. CONYERS. I thought that they were suggesting that religion can, by implication, be covered by the 13th amendment, even though it is not specifically articulated.

Mr. HARRISON. When it is race. That was attacking a synagogue.

Mr. CONYERS. Okay. Again, Mr. Hutchinson, I thank you for your generosity and the gnawing in the pit of your stomach and everything. I think that you would be very, very proud that you led the discussion in these very historic hearings. I thank you very much.

I return the time to Mr. Scott.

Mr. SCOTT. I appreciate your indulgence, Mr. Chairman. I yield back.

Mr. HUTCHINSON. Thank you. I am very privileged to sit up here in this very important hearing. I think a great deal has been accomplished today.

I looked forward to continued progress on this issue. I thank the panel again and the audience.

The committee will be adjourned.

[Whereupon, at 1:55 p.m., the committee was adjourned.]

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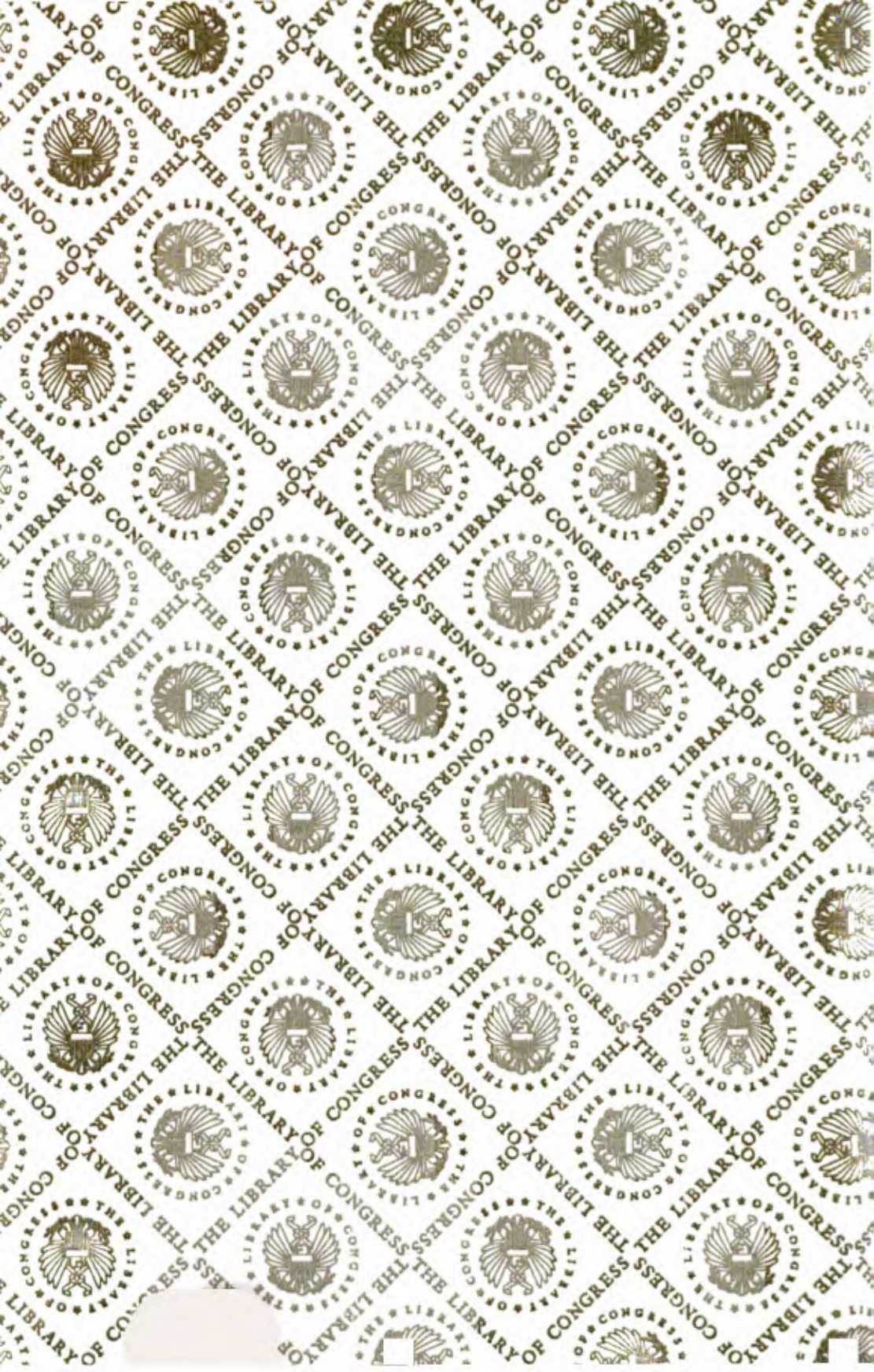
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